TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 207.

THE WORLD'S FAIR MINING COMPANY, PLAINTIFF IN ERROR,

vs.

FRANK POWERS AND JOSEPHINE POWERS.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

(22,017.)

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INDEX.

	Original	Print
Caption	*a*	1
Abstract of record from district court	1	1
Amended complaint	1	1
Exhibit A—Agreement between Frank Powers *et ux.* and Ray Ferguson, September 4, 1903	15	8
B—Notice to the Arizona National Bank, April 15, 1904	20	10
C—Agreement between Frank Powers *et ux.* and Ray Ferguson, April 15, 1904	25	13
Second amended answer	26	13
Reply to second amended answer	35	17
Stipulation for change of venue	39	19
Verdict	39	20
Judgment	40	20
Motion for new trial	41	21
Order granting new trial	42	21
Order to transfer to county of Pima	43	21
Order setting motion as to security for costs	44	22
Order for security for costs	44	22
Order setting cause for trial	45	22

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 28, 1911.

	Original	Print
Order for continuance	45	22
Order setting cause for trial	46	23
Order beginning trial	46	23
Order overruling motion to strike from reply	48	24
Order overruling demurrer to amendment to reply	49	24
Order to produce books, etc.	49	24
Order continuing trial	50	24
Order continuing trial	51	25
Order concluding trial	52	25
Verdict	53	26
Order for judgment	53	26
Order as to deposit of jury fee	54	26
Order setting motion for new trial	55	26
Order overruling exceptions to cost bill	55	26
Order noting exception and appeal	56	27
Order overruling motion for new trial	56	27
Order noting exception and appeal	57	27
Order fixing time to file statement of facts, &c.	57	27
Abstract of testimony	58	28
Stipulation as to evidence	58	28
Testimony of Frank Powers	59	28
Bracy Curtis	85	41
N. E. Webber	86	41
D. A. Stewart	89	43
Frank Powers (recalled)	92	44
D. A. Stewart (resumed)	93	45
Z. F. Rawson	95	46
John W. Booth	104	50
Ray Ferguson	105	50
k Powers	113	54
Frank [illegible] Hereford	116	56
Instructions of the court	118	57
Plaintiff's Exhibits A and B	118	57
C—Letter of Booth to Powers, March 28, 1905	119	57
Letter of Booth to Powers, March 28, 1905	121	58
D—Letter of Booth to Ives, April 7, 1905.	121	58
E—Letter of Booth to Ives, April 19, 1905.	123	59
F—Letter of Booth to Ives, May 12, 1905.	125	60
Defendants' Exhibit I—Passbook of London-Glasgow Development Company	127	61
II—Letter, Ives to Booth, April 1, 1905	128	62
III—Letter, Ives to Booth, April 13, 1905	129	62
IV—Letter, Ives to Booth, April 24, 1905	130	62
V—Letter, Ives to Booth, April 26, 1905	132	63
Order setting cause for hearing	134	64
Order submitting cause on briefs	134	64
Opinion	135	65

	Original	Print
Judgment	149	71
Motion for rehearing	150	71
Order submitting motion for rehearing	157	74
Order denying motion for rehearing	157	74
Notice of appeal	157	74
Order granting appeal	158	75
Motion to withdraw appeal and order granting motion	159	75
Petition for writ of error and allowance	161	76
Assignment of errors	164	77
Bond on writ of error	169	79
Clerk's certificate	172	80
Writ of error	173	81
Citation and service	176	82
Order enlarging time for filing record in Supreme Court of the United States	179	83

a In the Supreme Court of the Territory of Arizona.

No. 1078.

THE WORLD'S FAIR MINING COMPANY, a Corporation, Appellant,
vs.
FRANK POWERS and JOSEPHINE POWERS, Appellees.

On Appeal from the District Court of the First Judicial District of the Territory of Arizona.

Frank H. Hereford, Esq., and Frank E. Curley, Esq., Attorneys for Appellant.
Eugene S. Ives, Esq., and Samuel L. Pattee, Esq., Attorneys for Appellees.

Be it remembered that on to-wit: the eighth day of December, 1908, came the appellant in the above entitled cause, by its attorneys Messrs. Frank H. Hereford and Frank E. Curley, and filed in the clerk's office of said court, in said entitled cause, a certain Abstract of Record in words and figures, after correction with the original papers on file in said cause, following, to-wit:

1 In the District Court of the Second Judicial District of the Territory of Arizona, in and for the County of Santa Cruz.

THE WORLD'S FAIR MINING COMPANY, a Corporation, Plaintiff,
vs.
FRANK POWERS and JOSEPHINE POWERS, Defendant-.

Amended Complaint.

Now comes the plaintiff herein, amending its complaint, and for cause of action alleges:

I.

That plaintiff is a corporation duly organized and doing business in the County of Santa Cruz, Territory of Arizona, and that the defendants are both residents of the said county of Santa Cruz, Territory of Arizona;

II.

That on the first day of September, A. D., 1903, the defendants were, and ever since have been, subject to the rights of plaintiff hereinafter set out, the owners of those certain mining
2 claims, situate in the Harshaw Mining District, in the County of Santa Cruz, Territory of Arizona, known as and comprising the World's Fair Group of Mines, the said mines being located under the names of the Silver Lining, World's Fair, Mountain Chief, Josey, Wedge, Kruger, Wilcutt and Mill Site.

III.

That on or about the 4th day of September 1903, one Ray Ferguson, as party of the first part, made and entered into a contract with the said defendants, and each thereof, as parties of the second part. That under the terms of said contract, the parties of the second part agreed to sell said mines, and all thereof, to the said Ray Ferguson, his heirs, executors, administrators or assigns and the said parties of the second part further agreed that they would within ninety days place in escrow with the Arizona National Bank, at Tucson, Arizona, deeds conveying the said mines and mining property to the said Ray Ferguson, his heirs, executors, administrators or assigns, said escrow to be conditioned that if the said Ferguson should well and faithfully perform his part of the agreement, then the deeds, together with the full net proceeds of the ores and products of the mines should be delivered to the said Ray Ferguson; that the said Ray Ferguson should take and keep possession of the mines, and all of them, until the end of the contract, unless the said Ferguson, or his successors in interest should fail to commence work
3 within ninety days, or should fail to continue and prosecute the work; that the said Ferguson and his successors in interest should work and mine said group of mines, extract and ship ores therefrom, and erect and maintain such machinery and improvements thereon as he, or they, desire; that the ores and products of the mines should be shipped to a smelter; that the said Ferguson, or his successors in interest, should receive the returns from said shipments, and, after deducting and retaining $12.00 per ton on all ore or products shipped, and the shipping charges, should deposit the balance or net proceeds with the Arizona National Bank, subject to the terms of the said escrow; that the said Ferguson should cease not less than fifty feet of work per month to be done on said group of mines commencing ninety days from the date of the contract and that on or before the completion of one thousand feet of work, the said Ferguson should pay to the said defendants Four Hundred and Fifty Thousand Dollars ($450,000.00), and should deliver to the said defendants one-fourth of the capital stock, full paid and non-assessable, of a company to be organized by the said Ferguson; that the entire purchase price of the said mines and mining property was to be Four Hundred and Fifty Thousand Dollars ($450,000.-00), and the said stock, and upon the payment and delivery of the same, within the time prescribed, the deeds and money in escrow were to become the property of the said Ferguson, or his
4 successors in interest; that the said Ferguson was to organize a stock company to operate and work the said mines and mining properties; that the said Ferguson should, during the life of this agreement, have free use of all the buildings and mining machinery situated on or used in connection with the said property, except a certain dwelling house; and that said agreement should extend to and bind the heirs, executors, administrators and assigns of the parties thereto, a copy of which said contract, Marked Exhibit "A", is hereto attached and made a part hereof.

IV.

That thereafter, and on the 15th day of April, 1904, defendants, and the said Ray Ferguson, for himself and his successors in interest, made, executed and delivered each to the other two additional contracts, copies of which are hereto attached and made a part hereof, and Marked Exhibit "B", and Exhibit "C", respectively, each of which said contracts contained additional provisions relating to the disposition of the gross receipts of the moneys received by the said Ray Ferguson and his successors in interest to the said contracts.

That under and by said contract marked Exhibit B, the right of the said Ray Ferguson and his successors in interest to retain $12.00 per ton and the shipping charges on all ore or products shipped from the said mines, was confirmed to the said Ray Ferguson and his successors in interest, and the time for the payment to be
5 made by the said Ray Ferguson and his successors in interest to the said Arizona National Bank for the credit of the said defendants of all sums due them from ores and products shipped was extended to a period of time equal to fifteen days from the receipt thereof by the said Ray Ferguson or his successors in interest.

And by the terms of the contract marked Exhibit C, all such sums so paid were to be paid as a part of the purchase price of the said mines, under the terms of the said contract.

V.

That thereafter, the said Ray Ferguson sold, assigned and transferred to the London-Glasgow Development Company, a corporation, by and with the consent of the defendants, and each of them, and thereafter, and on or about the 20th day of May, 1904, the said London-Glasgow Development Company sold, assigned and transferred to the plaintiff herein, by and with the consent of the defendants, and each of them, all the right, title and interest of the said Ray Ferguson and the said London-Glasgow Development Company in and to the said contracts, and in and to all the rights and privileges of the said Ray Ferguson and the said London-Glasgow Development Company under the said contracts, and in and to all machinery, work and other improvements put upon the said property by the said Ray Ferguson and the said London-Glasgow Development Company, and in and to all other property of every
6 character whatsoever in, on or about or used in connection with, in, on or about the said mines, and belonging to the said Ray Ferguson and the said London-Glasgow Development Company, and including the right to take possession of the said mines, and each and all thereof, and to work and mine the said mines, and each and all thereof, and to ship ores therefrom, and to erect and maintain machinery and other improvements thereon, and to be allowed the sum of $12.00 per ton, and all shipping and smelting charges, upon all ores shipped from the said mines; and plaintiff has ever since been the owner of the said contracts, and the said rights and privileges growing out of the same, and subrogated to

all the right, title and interest of the said Ray Ferguson and the said London-Glasgow Development Company, in and to or growing out of the said contracts and in and to all machinery and improvements put upon the said mines, and in and to all personal property thereon.

VI.

That heretofore, and on or about the 11th day of June, 1904, this plaintiff was in possession of the said mines, and each and all thereof, and the improvements and other property thereon and of certain ores then in process of shipment therefrom, under and by the terms of the said contracts; that on or about the said time, this plaintiff had a large sum of money, namely: more than Seven Thou-
7 sand Dollars ($7,000.00) on deposit, subject to its check with the First National Bank of Nogales, in the town of Nogales, in the County of Santa Cruz, Territory of Arizona, where the principal place of business of the plaintiff was situated; that at said time, the plaintiff was working, developing and mining the said mines, and shipping ores therefrom, under its said contracts and generally carrying on the business for which it was formed and which it was authorized and entitled to carry on under the terms of the said contracts; that at said time plaintiff and its predecessors in interest had expended a large sum of money under said contracts in work, developments and improvements in and about the said claims and mining property, to-wit: about the sum of Thirty-five Thousand Dollars ($35,000); that about said time plaintiff had demonstrated that its said contracts with the said defendants, and its rights and privileges thereunder, were worth not less than One Hundred and Fifty Thousand Dollars ($150,000.00) over and above the obligations, payments and expenses plaintiff would have had to assume, make or cause to be made or paid; that the plaintiff then had reason to believe, and ever since has and still believes that its rights, titles and interests in and to the said contracts, together with the improvements, machinery and appurtenances that plaintiff and plaintiff's predecessors in interest had done or caused to be done and placed upon the said mines and mining claims, were worth, and
8 could then be sold for the sum of One Hundred and Eighty Five Thousand Dollars $185,000.00).

VII.

That on or about the 11th day of June, 1904, the defendants wrongfully and unlawfully, and with the intent and object of breaking and abrogating their said contracts with plaintiff, and of depriving plaintiff of the possession of the said mines and improvements thereon, and its right to purchase the said mines and improvements thereon, and its rights under said contracts, caused garnishment and attachments to be levied upon the money of the plaintiff in the First National Bank of Nogales, for alleged debts amounting to over $14,600.00, and caused attachments and garnishments to be levied upon certain ores extracted by plaintiff from the said mines, and shipped by it to the railroad depot in Patagonia, said County

of Santa Cruz, and caused attachments and garnishments to be levied upon all other assets of plaintiff, except the said machinery, development and improvements, as the said plaintiff possessed in the Territory of Arizona, for and on account of the said alleged debt of about $15,000.00; that the said alleged indebtedness of about $15,000.00 was, in the complaint in said action, alleged as an indebtedness of the London-Glasgow Development Co. of $6,617.00, together with an alleged indebtedness of this plaintiff of $8,000; and defendants, at the same time wrongfully and unlawfully procured injunctions to issue out of this court in the said case, and
9 to be served upon plaintiff, commanding plaintiff to refrain from shipping any ores mined by it or otherwise from said mines; and in and by said attachments garnishments and injunctions wrongfully and unlawfully sought to harass and annoy plaintiff and prevent plaintiff from carrying out the terms of its said contracts and obtaining the benefits and profits therefrom, and to prevent plaintiff from selling or disposing of its said contracts, and rights thereunder, to plaintiff's damage in the sum, as aforesaid, $185,000.00; that thereafter plaintiff succeeded in having the said injunction dissolved; that defendants then sought to obtain a new injunction; that plaintiff succeeded in defeating defendant's efforts to obtain a new injunction but defendants proceeded in their said litigation, and maintained their said garnishment and attachment upon all of the property and effects in this Territory of plaintiff, and threatened and gave out that they would attach and garnish any other funds, moneys or effects that plaintiff should bring into this Territory for the purpose of carrying out the conditions of its said contracts and that defendants continued to harass, impede and defeat the efforts of the plaintiff to carry out the terms of its said contracts.

VIII.

That at the time defendants brought the said suit against the plaintiff, plaintiff was not indebted to the defendants in any
10 sum, or at all, and that at the time defendants sought to obtain the said injunction, defendants had no grounds therefor, but that the said action was commenced, and the said injunction caused to be issued upon sworn statements made by the said defendants, falsely alleging that plaintiff was indebted to defendants and falsely alleging that plaintiff had failed, neglected and refused to live up to the terms of its said contracts with defendants.

IX.

That the actions of defendants in causing garnishments and attachments to be levied upon the property and effects of plaintiff, and upon the ore which plaintiff was shipping; and the actions of defendants in causing the injunction to issue and be served upon plaintiff, caused plaintiff to fear that if it sent any more money or property in to the said Territory of Arizona for the purpose of enabling it to continue work under the said contracts, and carry on the contracts under the terms thereof, would simply result in new

attachments and garnishments being levied upon such money and property as plaintiff should cause to be sent, as aforesaid, into said Territory; that the said actions of the said defendants in causing said garnishments and attachments to be issued and served and causing said injunctions to issue, injured plaintiff's credit in the Territory of Arizona, and elsewhere, amongst people to whom it could appeal in case it needed money or property, and who
11 would respond to said appeal, and that the said actions of the said defendants in causing the said attachment and garnishments to issue and be levied, and in causing the said injunction to be issued and served, so far interferred with plaintiff's business and plans as to very much cripple and impede plaintiff in its efforts to work and mine the said mines and ship ore therefrom under its said contracts, but that when plaintiff had finally succeeded in overcoming the conditions occasioned by the wrongful and unlawful acts of defendants, and on or about the 25th day of July, 1904, the defendants unlawfully and wrongfully, and with force and arms, entered in and upon the possession of the said mines and mining claims, and compelled plaintiff's agents, servants and employees, to cease working and mining the said mines and mining claims, and to cease shipping ores therefrom, and caused and required the said agents, servants and employees of plaintiff to go away and remain away from the said mines and mining claims, and that the said defendant- at said time wrongfully and unlawfully, and with force and arms, aforesaid, deprived plaintiff of the possession of the said mines and mining properties referred to herein, and of the improvements and machinery and workings placed thereon, and made therein and thereon by plaintiff and plaintiff's predecessors in interest, and refused and still refuses to permit plaintiff, its agents, servants, or employees to go in, on or about the said mining properties, or any part thereof, for any purpose or at all, and refused and still
12 refuses to permit plaintiff to remove its said machinery or improvements, or any part thereof; that in consequence of these said actions of defendants, plaintiff has been deprived of every asset it possessed in the Territory of Arizona, and is and has been unable to carry on its said business, to work and mine the said mines, or mining claims, or any thereof, or to ship ore therefrom; and plaintiff has by said wrongful and unlawful actions of defendants been prevented from enjoying the benefits of any of its rights under its said contracts; that by reason of the defendants' said wrongful and unlawful actions, plaintiff's contracts have been rendered and made, and are now of no value, other than springs from its rights to recover in this action, that defendants have, as aforesaid, wrongfully and unlawfully converted to their own use and deprived plaintiff of the said improvements and workings, to plaintiff's damage in the sum of $35,000.00; that defendants have, as aforesaid, wrongfully and unlawfully deprived plaintiff of its privileges and benefits under the said contract, to plaintiff's damage in the sum of $150,000.00; that plaintiff has repeatedly demanded of defendants the possession of the said property, and all thereof, together with the improvements and appurtenances thereon, and that defendants

have, and still do, refuse to give possession of the said properties, or any part thereof, to plaintiff, or to permit plaintiff its agents, servants, or employees to go in, on or about the said properties or any part thereof.

13

X.

That defendants have never released or discharged the said attachments or garnishments, but on the contrary have ever since, and still are seeking to enforce and maintain the same.

XI.

That the improvements and machinery placed upon the said property by plaintiff and plaintiff's predecessors in interest were up to the time of the commencement of this action reasonably worth the sum of $35,000.00, and plaintiff is informed and believes and therefore alleges that the said improvements and machinery are still worth the sum of $35,000.00.

XII.

That the reasonable value of said contracts of plaintiff with said defendants, on or about the 11th day of June, 1904, and at the time of defendants' said alleged wrongful actions, together with the rights and privileges thereby granted, was $150,000.00, over and above all liabilities, payments and expenditures of every kind, which would have to be made under or by reason of the terms of said contracts, and plaintiff is informed and believes and therefore alleges that the reasonable value of said contracts of plaintiff with defendants, together with the rights and privileges granted thereby, ever since have been and still would be worth $150,000.00, over and above all liabilities, payments and expenditures of every kind, which

14 would have to be made under or by reason of the terms of the said contracts, if plaintiff or its successors in interest were allowed to take possession of the said mines and mining property, and proceed thereunder, unhampered or unimpeded by the wrongful acts of the defendants. That said contracts, and the said improvements and machinery, and other property hereinabove referred to as being property of the plaintiff, are, and each thereof, are made and have become, by reason of the said wrongful and unlawful acts of defendants as aforesaid, of no value whatsoever to the plaintiff or anyone else claiming through, by or under plaintiff.

XIII.

That the plaintiff could have made a profit of more than $150,000.00, over and above all expenditures and payments due or to become due, under or growing out of the said contracts, if plaintiff had been permitted to enjoy the rights and privileges to which it was entitled under the terms of said contracts, and which it was deprived of by defendant's wrongful and unlawful acts as aforesaid.

XIV.

That the use, occupancy and possession granted by the said contracts to the said parties of the second part were, and each and all were, essential to enable plaintiff to fulfill the terms of said contracts, and more particularly to enable plaintiff to work the said mines, extract the said ores, ship the products of the said mines, and ascertain and demonstrate the value of the said mines and the value of the said contracts and each and all thereof were necessary to enable plaintiff to ascertain the full value of the said mines, and thereby either pay for the said mines out of the products thereof, or procure the money with which to buy and purchase the said mine, or to induce and procure others to purchase the said mines and improvements.

Wherefore, plaintiff prays that it have judgment against the defendants, Frank Powers and Josephine Powers, and each thereof, for the sum of $185,000, and that plaintiff recover its costs herein.

FRANK H. HEREFORD,
Attorney for Plaintiff.

(Filed April 9, 1906.)

EXHIBIT "A."

This agreement, made and entered into this 4th day of September, A. D., 1903, by and between Frank Powers and Josephine Powers, his wife, of Harshaw, in the County of Santa Cruz, Territory of Arizona, the parties of the first part, and Ray Ferguson, of the Town of Nogales, County and Territory aforesaid, the party of the second part,

Witnesseth: That the parties of the first part, for and in consideration of the sum of ten dollars, lawful money of the United States, to them in hand paid by the party of the second part, receipt whereof is hereby acknowledged, and the further consideration hereinafter specified, hereby agree with the said party of the second part to sell to the said party of the second part all their mining claims, and each of them, situated in the Mining District of Harshaw, in the County and Territory aforesaid, known as and comprising the World's Fair Group of Mines, and located under the following names or titles, to-wit: The Silver Lining, World's Fair, Mountain Chief, Josey, Kruger, Wedge & Wilcut, and Mill Site.

The parties of the first part further agree with the party of the second part, that within a period of ninety (90) days they will place in escrow in the Arizona National Bank of Tucson, Arizona, the deeds of the mining properties hereinbefore mentioned, and the conditions of said escrow shall be such that if the party of the second part shall well and faithfully perform his part of this agreement, then the said deeds, together with the full net proceeds of the treatment and shipment of ores, concentrates or bullion produced by the treatment of the ores as hereinafter described, shall be turned over to the party of the second part or his representatives.

It is understood and agreed by and between the parties hereto that the sale of the said mining properties shall be under the following conditions, to-wit: That the said party of the second part shall, on or before the expiration of ninety days from the date hereof, begin active work on the property hereinbefore mentioned, and
17 known as the "World's Fair" group of mines, and shall prosecute such work at the minimum rate of not less than two feet per day in sinking and drifting on or below the present main level of the said World's Fair Mine, and shall continue such work at such stipulated rate until the full amount of one thousand feet of work has been so performed in a workmanlike and customary manner.

It is further agreed that all ore which can be taken out in such working, or stoped out below the said main level of the aforesaid World's Fair mine, and all ores now on the dumps, shall be milled and concentrated or leached on the grounds, according as the character of the ore may require; and it is understood and agreed that the sum of twelve dollars per ton shall be allowed by the parties of the first part to the party of the second part for such treatment.

On all ores if any should be extracted from the workings hereinbefore described, which are better adapted to be shipped directly to a smelter, and upon all concentrates, it is understood and agreed that a further allowance to the extent of the shipping and smelting charges shall be allowed by the parties of the first part to the party of the second part. The party of the second part is hereby authorized and he agrees to ship such products, and after the deduction of the said shipping and smelter charges, to deposit in trust in the Arizona National Bank, Tucson, Arizona, the net proceeds therefrom, the same to remain in trust in said bank until the expiration of
18 this agreement, which shall be upon the completion of the aforesaid one thousand feet of work, or until such time as the party of the second part shall pay or cause to be paid to the parties of the first part the full sum of Four Hundred and Fifty Thousand Dollars in lawful money of the United States, and shall deliver to said parties of the first part one-fourth of the capital stock fully paid up and non-assessable, of a company to be organized by the said party of the second part; and it is understood and agreed that upon the payment of said sum of four hundred and fifty thousand dollars, and the delivery of said capital stock on or before the completion of the said one thousand feet of work, all moneys thus deposited in trust as aforesaid shall be and become the money of the said party of the second part.

The said party of the second part hereby agrees to organize a stock company to operate and work the said mining properties and to work them in the manner customary to such organization.

If for any reason, other than an act of God, the said party of the second part shall fail to commence work within the said ninety days, as herein agreed upon, or shall fail to prosecute the work in the manner and at the rate herein agreed upon, then this agreement shall become null and void, and the deeds to said property, together with any moneys, the product of the ores shipped or treated as here-

inbefore described, shall revert to the said parties of the first
19 part without recourse by the party of the second part.

It is understood and agreed that in estimating the minimum work of two feet per day, as hereinbefore provided, the measurement shall be taken at the end of each month and fifty feet in any one month shall constitute the minimum two feet per day for the purposes of this agreement.

The parties of the first part hereby agree that the party of the second part shall, during the life of this agreement, have the free use of all buildings and mining machinery now situated upon and used in connection with the said property, save and except the dwelling house now occupied by the parties of the first part.

It is further understood and agreed that all mining machinery and permanent improvements which may be placed upon the property by the party of the second part during the life of this agreement, shall become the property of the parties of the first part in case the party of the second part shall fail to carry out the covenants in this agreement specified to be by him kept and performed.

It is also agreed that all growing timber upon the said properties, shall, during the life of this agreement, be reserved to the use and benefit of the parties of the first part.

And it is finally agreed by and between the parties hereto that all the provisions, covenants and contracts contained herein shall extend to and be binding upon the heirs, executors, administra-
20 tors and assigns of the parties hereto.

In witness whereof, the said parties have hereunto set their hands and seals this 4th day of September, A. D., 1903.

[SEAL.]	(Signed)	RAY FERGUSON.
[SEAL.]	(Signed)	FRANK POWERS.
[SEAL.]	(Signed)	JOSEPHINE POWERS.

Acknowledged by Frank Powers and Josephine Powers on September 4th, 1903, before Phil. Herold, Notary Public.

EXHIBIT "B."

TUCSON, ARIZONA, *April* 15, 1904.

To the Arizona National Bank, Tucson, Arizona:

Please take notice that the deed from Frank Powers, and Josephine Powers, his wife, to Ray Ferguson, for the World's Fair group of mines in Santa Cruz County, Arizona, together with the deed from Ray Ferguson and Jessie Ferguson, his wife, and the London & Glasgow Development Company, to the World's Fair Mining Company, a corporation organized under the laws of the Territory of Arizona, contained in the accompanying envelope are placed with you in escrow with the following instructions:

Upon depositing with you to the joint account of Frank Powers and Josephine Powers of the sum of Four Hundred and Fifty Thousand Dollars ($450,000) together with a certificate for
21 Fifty Thousand (50,000) shares of the capital stock of the said World's Fair Mining Company, of the same form as the

certificates for one share hereto attached, you will send the deeds by express to the Recorder of the County of Santa Cruz, Territory of Arizona, with instructions to said Recorder to record the same, and deliver them with such record to Ray Ferguson or his order.

If either Frank or Josephine Powers should at any time previous to the depositing of all of the said sum of money and of the said certificate for 50,000 shares of stock demand in writing that you ascertain whether the said Ray Ferguson has during any calendar month failed to do or cause to be done 50 feet of sinking or drifting on or below the present main level of the World's Fair Mine, or whether the said Ray Ferguson has failed to deposit or caused to be deposited with you to the joint credit of Frank and Josephine Powers as aforesaid, all sums of money in gross received by him, his representatives or assigns for treating the ore from said World's Fair Mine upon the mines, in excess of the sum of $12 per ton, or any sums of money received as return upon any shipment of ore or concentrates shipped by him or them from said mines in excess of $12 per ton, plus the expense of shipment and smelter treatment, and if at the time of making such demand upon you, the said Frank or Josephine Powers guarantee to you, by depositing of money, or such other way as you may direct, the expense of ascertain-
22 ing all or any of the above mentioned things, then it shall be your duty to designate some person in whom you have confidence, to ascertain such facts, the ascertainment of which shall have been so demanded; and if such person so designated by you shall certify to you either that the said Ray Ferguson nas not done or caused to be done during any one calendar month, 50 feet of sinking or drifting on or below the present main level of the World's Fair Mine, or that the said Ray Ferguson has not deposited or caused to be deposited with you to the joint account of Frank and Josephine Powers a sum of money equal to the gross receipts of all ores from the World's Fair mines treated at the mine during the preceding calendar month for more than 15 days after the receipt by the shipper of the bullion returns, less the sum of $12 per ton, or that the said Ray Ferguson has not desposited with you to the joint account of Frank and Josephine Powers a sum of money equal to the gross receipts from each shipment of ore or concentrates shipped from the said mines, less the sum of $12 per ton, and also less the cost of shipment and smelter treatment for more than 15 days after the receipt by the shipper of the returns from such shipment, then you will at once deliver the said deed executed by Frank and Josephine Powers to the said Frank and Josephine Powers, or their order, and you will at once destroy the deed to the said corporation executed by the said Ray Ferguson and wife and London-Glasgow Development Company.

23 If the said Frank and Josephine Powers shall at any time notify you that the said Ray Ferguson has done or caused to be done 1,000 feet of sinking or drifting on or below the present level of the World's Fair Mine, since the 5th day of December, 1903, then you shall at once upon proper provision for the expense thereof by the said Frank or Josephine Powers, designate some person to as-

certain whether said 1,000 feet of work has been so done or not; and if such person so designated by you shall certify that the said Ray Ferguson has done or caused to be done 1,000 feet or more of sinking and drifting on or below the present main level of the World's Fair Mine, then, if within ten days after such person shall so certify to you, the whole of the said sum of $450,000 and the said certificate for 50,000 shares of the capital stock shall not have been placed with you to the order of Frank and Josephine Powers, you will at once deliver to the said Frank and Josephine Powers, or their order, the deed executed by said Frank and Josephine Powers, and destroy the deed to the said corporation executed by the said Ferguson and London and Glasgow Development Company.

If any person designated by you as aforesaid to ascertain any of the aforesaid facts, shall report to you in writing that he has been refused permission to enter into the said mines and examine them with a view to ascertaining said facts, or any of them, or has
24 been refused access to the books, accounts or mill-records by the person or persons in possession of the said mines, book accounts and mill records, and operating the same or extracting ore therefrom, then you shall at once deliver to the said Frank and Josephine Powers or their order the said deed executed by said Frank and Josephine Powers, and destroy the deed executed by the said Ferguson and wife and London and Glasgow Development Company.

If the full sum of $450,000 and the said certificate for 50,000 shares of stock shall not have been deposited with you to the joint account of Frank and Josephine Powers on or before the 5th day of August, 1905, then you will at once deliver to the order of Frank and Josephine Powers the said deed executed by Frank and Josephine Powers and destroy the deed to the said corporation executed by the said Ferguson and wife, and London and Glasgow Development Company.

FRANK POWERS.
JOSEPHINE POWERS.
RAY FERGUSON.

The interlineations therein named were made before execution.

FRANK POWERS.
JOSEPHINE POWERS.
RAY FERGUSON.

In the presence of

——— ———.

The words "and the London and Glasgow Development
25 Company," "World's Fair Mining Company of the same form as the certificate for one share hereto attached," and the word "or" all on the first page and the words "by the shipper," "and also less" and "by the shipper" on the second page and the words "book accounts and mill records" on the third page having been interlined before execution.

EUGENE S. IVES.

EXHIBIT "C."

This Agreement, made this 15th day of April, 1904, between Frank Powers and Josephine Powers, his wife, of Harshaw, in the County of Santa Cruz, Territory of Arizona, parties of the first part, and Ray Ferguson, of the Town of Nogales, County and Territory aforesaid, and the London and Glasgow Development Company, a corporation, organized under the laws of the Territory of Arizona, parties of the second part,

Witnesseth, In consideration of One Dollar, in hand paid, by the parties of the first part to the parties of the second part, the receipt whereof is hereby acknowledged, the parties hereto mutually agree as follows:

Whereas, A certain agreement was entered into between all of the parties hereto, except the London and Glasgow Development Company, of date the 4th of September, 1903.

Now, Therefore, it is hereby agreed that the said contract of the 4th of September, 1903, is amended and modified to this
26 effect: That all moneys agreed to be deposited with the said Arizona National Bank in and by said contract shall not be deposited in trust as in said contract provided, but shall be deposited to the joint account of Frank and Josephine Powers, and upon being so deposited shall at once be the absolute property and at the immediate disposal of the said Frank and Josephine Powers, and the said sum shall be credited upon the $450,000, cash consideration in said contract provided for; and upon the deposit of said sums to the said account of Frank and Josephine Powers, the parties depositing the same shall be at once released from all further liability upon the amounts of such deposits and all risks thereof.

In Witness Whereof, the parties hereto have hereunto set their hands this 15th day of April, 1904.

(Signed) FRANK POWERS.
JOSEPHINE POWERS.

In the presence of:
EUGENE S. IVES.

Second Amended Answer.

(Title of Cause.)

After various motions and demurrers not here material the answer proceeds:

If the said demurrer should be overruled, then the defendants, for amended answer to said amended complaint, allege and aver:

27

I.

Defendants deny the allegations in the third paragraph of the said complaint contained, except that the defendants admit the execution of the said contract in said paragraph mentioned and attached to the amended complaint, and marked Exhibit "A".

II.

The defendants deny the allegations in the fourth paragraph of the complaint contained, except that the defendants admit that the documents attached to the amended complaint and marked exhibits "B" and "C" were signed and executed.

III.

Defendants deny each and every allegation in paragraphs V., VI., VII., VIII., IX., X., XI., XII., XIII., XIV. of the complaint contained, except that the defendants admit the execution of the various documents in such paragraphs of the said amended complaint set forth, expressly, however, disclaiming any admission as to the effect of any of said documents or the intent with which they or any of them were executed.

And further answering the defendants allege and aver:

That the said Ray Ferguson was at all times the President of the said London-Glasgow Development Company and the general manager of the plaintiff corporation and one of the largest stockholders of both of said companies, and that the stock of both of
28 said companies was substantially owned by the said parties, to-wit: the said Booth, Stewart and their associates, who reside at Winona, in the State of Minnesota.

IV.

Defendants further allege that neither the said Ferguson nor the London-Glasgow Development Company, nor the plaintiff, have complied with the conditions of the said contract.

V.

That the said Ferguson and his associates in the name of the London-Glasgow Development Company, shipped to the Consolidated Kansas City Smelting and Refining Company at El Paso, Texas, in four separate shipments about 147 tons of ores from the mines of the defendants and that the said Ferguson and his associates in the name of the London-Glasgow Development Company did receive as the proceeds of said ore over and above the railroad freight charges and the charges of the said Smelting Company for treatment the gross sum of $5,630.66; that the cost of shipment of all said ores over and above the said railroad charges for freight amounted to not to exceed the sum of $5.00 per ton, to-wit: the sum of $735; and that the said Ferguson and his associates under the name of the said London-Glasgow Development Company as aforesaid, did retain to their own use and benefit all of
29 said proceeds except the sum of $204 and some cents, and that there was justly due and owing out of the proceeds of the said ores to the defendants the sum of $4,895.66, and that if the construction of the said contract contended for by the plaintiff and the said Ferguson and associates and said London-Glasgow Development Company was correct and they were entitled to the

sum of $12 for each ton of said ore in addition to said charges of treatment and shipment, to-wit; the sum of $1,764, then out of the proceeds of the said ore the defendants were entitled to the sum of $3,131.66, to which the said Ferguson and associates and the said London-Glasgow Development Company, as defendants are informed and believe, make or can make no claim whatever; and that the said Ferguson and associates and said last named company did retain and convert to their own use all of the said last mentioned sum, except the sum of $204.39 without any right or claim of right.

That, thereafter, and on or about the 15th day of April, 1904, the said Ferguson and his associates, procured to be organized the plaintiff corporation, and that the said contract was assigned by the said London-Glasgow Development Company to the said plaintiff corporation through the procurement of the said Ferguson and his associates, and with knowledge that the said London-Glasgow Development Company was indebted by reason of the aforementioned facts, to the defendants in a large sum of money and without provision for the payment of the said sum of money to the
30 defendants or to the liability of any one except the said London-Glasgow Development Company to the said defendants and well knowing that the said London-Glasgow Development Company by reason of such assignment would be entirely without any assets or money and unable to pay the said indebtedness to the defendants or any part thereof.

VI.

That on or about the 31st day of May, 1904, the plaintiff in pursuance of the terms of said contract, shipped 71 tons of ore from the mines of the defendants to the said Consolidated Kansas City Smelting and Refining Company in two shipments, one thereof of 33 tons, and the other thereof of 38 tons. That none of the said ore was leached, milled or concentrated on the ground of the said mines.

That on or about the 6th day of June, 1905, the plaintiff received from the said smelting and refining company the sums of $6,766.39 and $866.39, making a total of $7,632.78 as the net proceeds from the said 71 tons of ore shipped as aforesaid, after the deduction of said smelting and refining company of all railroad freight and smelter charges from the gross proceeds thereof. That the additional cost of shipment of the said 71 tons of ore was $5 per ton for sacking, sorting and hauling of said ore to the railroad station as per agreement, and that after deducting the same from the
31 aforesaid total there remained on the said 6th day of June, 1905, in the hands of the plaintiff for deposit to the credit of the defendants as in said agreements and Exhibits "A" and "C" provided, the sum of $7,277.78.

VII.

That on or about the 11th day of June, 1905, there was on deposit in the First National Bank in Nogales to the credit of the plaintiff, the sum of $7,322.02; that the said sum and all of it was a

part of the proceeds of the said 71 tons of ore shipped as aforesaid; that the plaintiff wrongfully and in violation of the said contract was keeping and retaining the said sum of money and without excuse was withholding payment of the same to the defendants; that the plaintiff at said time was largely in debt and had no money or resources, and that on said 11th day of June, 1905, the plaintiff had drawn and issued its checks upon the said funds belonging to the defendants as aforesaid in the said bank and that the said checks were presented for payment on the following Monday, the 13th day of June, 1905. That the said Ferguson and his associates and the plaintiff, as defendants are informed and believe intended to convert the said seven thousand odd dollars properly belonging to the defendants to the uses of themselves, and that the defendants did on or about the 11th day of June, 1905, institute an action against the plaintiff in the district court of the County of Santa Cruz, and did garnish the said sum of money on deposit in
32 the said bank, and did procure and obtain a preliminary injunction restraining the plaintiff from shipping any further ores from the defendants' mines. That the said preliminary injunctions were dissolved upon a hearing before the Judge of the District Court in which a demurrer to the complaint in said action was sustained on the ground of improper joinder of parties defendant. That the plaintiff in said action did thereupon amend their complaint and that the said action was brought, and that upon said trial and on or about the 22nd day of April, 1905, judgment was entered in the said action in favor of the plaintiffs therein, and defendants herein, for the sum of $6,425.78. That the amount of said plaintiffs' judgment in said action was less than the amount prayed for in said action, and that in and by said judgment it was also decreed that the plaintiffs in said action were not entitled to the injunction prayed for; that the plaintiffs in said action did thereupon appeal to the supreme court of the Territory of Arizona, from those portions of the said judgment decreeing that the plaintiffs therein were not entitled to an injunction and in decreeing to the plaintiff a less sum than that prayed for.

That the defendants in said action, the plaintiff herein, did not appeal from the said judgment that the plaintiffs in said action recover from the defendant therein the said $6,425.78. That the plaintiffs in said action duly perfected their appeal and the same was submitted by the respective parties to the supreme court
33 of the Territory of Arizona and is still pending in said court.

VIII.

Defendants further allege that subsequent to the commencement of the said action and prior to the alleged acts complained of whereby it is alleged that the defendants did take possession of the said mines from the plaintiff, the plaintiff was entirely insolvent; that it was conducting work upon the said mines in an unworkmanlike and improper manner to the great detriment of the said mines. That it was suffering and permitting water to rise in the said mines above

the level thereof and had caused the same to cave in and that the said water was continuing to rise, and that the said mines by reason of the acts of negligence of the plaintiff and of its insolvency and utter inability to give the said mines proper attention, were threatened with destruction and great damage and detriment.

That many suits had prior to the said time been instituted against the plaintiff by laborers and others, to which such suits the plaintiff had no defense whatever, and upon which judgments by default to a large amount were entered against the said plaintiff, and that the said judgments are still outstanding and unpaid.

That attachments were issued by the plaintiffs in said actions and that in pursuance of said attachments levies were made upon
34 the machinery and property of the plaintiff at the mines of the defendants and upon ores of the defendants which had been mined and which was in process of shipment. That such attachments and levies were in force and effect at the time; that it is alleged that the defendants by violence and arms ousted the plaintiff from the said mines. That said attachments, as defendants are informed and believe, have never been released by the plaintiff corporation or any person or persons acting in its behalf and the possession of the sheriff in the machinery and supplies at the said mine was never disturbed or contested by the plaintiff or anyone in its behalf. And, that if the defendants had permitted and suffered the plaintiff to retain the full and complete control of the said mines and had not themselves interposed to protect the said property, it would for the reasons aforesaid, have been greatly damaged, and the defendants would have incurred heavy and serious loss with no possibility of redress at law or otherwise.

Wherefore, defendants demand judgment that they be dismissed hence and that they do recover their costs against the plaintiff.

FRANK J. DUFFY,
EUGENE S. IVES,
Attorneys for Defendants.

Filed April 10, 1906.

35 *Reply to Second Amended Answer.*

(Title of Cause.)

After various motions and demurrers not here material the reply proceeds:

And for another and further reply to defendant's said second amended answer, the plaintiff denies each and every allegation therein contained except those hereinafter expressly admitted, and except those affirmatively and expressly alleged in plaintiff's amended complaint herein.

And plaintiff more particularly denies that the ores referred to in paragraph VI. of said second amended answer on lines 8 and 9 of page 9 were not concentrated on the ground of the said mines.

And plaintiff denies that there was on the 6th day of June, 1905, or at any other time, or at all, in the hands of plaintiff for deposit to the credit of defendants or either thereof, the sum of $7,277.78, or any other sum or at all, greater than the sum of $6,426.78; and plaintiff denies that it wrongfully or in violation of any contract, retained or was retaining or keeping any sum of money at all, which it was not entitled to keep.

And plaintiff alleges that on or about the 11th day of June, 1904, it had deposited in the First National Bank of Nogales, Arizona, to its credit, a sum in excess of $6,426.78; that on or about the 20th day of June, 1904, it would have been the duty of plaintiff under its contract with defendants to deposit with the Arizona National
36 Bank at Tucson, Arizona, to the credit of the said defendants the said sum of $6,426.78, and that it was not the duty of the plaintiff to deposit said money in said Arizona National Bank at any time previous to said 20th day of June, 1904. That nine days previous to the 20th day of June, 1904, and on or about the 11th day of June, 1904, the defendants instituted the suit referred to and described in the amended complaint herein, and in said action caused the said money in the said First National Bank of Nogales, and all thereof, to be garnished, and caused all of the other personal property of the plaintiff in the Territory of Arizona to be garnished and attached, and caused injunctions to be served upon plaintiff restraining it from shipping any ores from the said World's Fair mines and did each and every and all said things wrongfully and unlawfully, and with the purpose and object of endeavoring to break the contracts that plaintiff had with the defendants, being the same contracts set up in plaintiff's amended complaint herein, because it then appeared and had become apparent to the defendants that the contracts aforesaid were of great value, and because the defendants knew and realized that the damages that plaintiff could recover by reason of the wrongful acts of defendants in breaking said contract were very much less than the profits that plaintiff could make under their said contract with defendants; and for the further reason that defendants thought that by instituting said actions, causing said attachments, garnishments
37 and injunctions to issue that they so crippled and injured the credit and took away the resources of this plaintiff that plaintiff would be unable to carry out its said contracts with defendants, and that thereby defendants would deprive the plaintiff of and appropriate to their own use large profits exceeding in value $200,000, which defendants then believed would accrue to plaintiff if plaintiff were permitted to continue with their said contract. That thereafter finding that plaintiff still endeavored to continue under the terms of their said contract, defendant Frank Powers, for himself and the other defendant, with force and arms, entered upon the mines described in the amended complaint, and took forcible possession thereof, with the intent and object to wrongfully terminate said contracts, and depriving plaintiff of the profits thereof.

Wherefore plaintiff prays judgment as hereinbefore prayed for in their amended complaint.

FRANK H. HEREFORD,
M. B. WEBBER,
Attorneys for Plaintiff.

Filed April 10, 1906.

And for another and further answer to defendant's last amended answer in this case plaintiffs allege that the case hereinbefore referred to as brought by these defendants against this plaintiff was entitled: "In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Santa Cruz, Frank Powers and Josephine Powers, plaintiff, vs. The World's Fair Mining
38 Company, defendant, Number —" That a change in venue in said case was had to the said court of the First Judicial District of the Territory of Arizona in and for the County of Pima, and the case was in said last named court numbered —.

That heretofore and on the 25th day of May, 1908, the said case was duly and regularly tried in said last named Court, and judgment therein was entered against the said Frank and Josephine Powers, and in favor of the World's Fair Mining Company, and the said judgment quashed, vacated, discharged, and dissolved the said attachments and garnishments. That the questions as to the right of the said Frank and Josephine Powers to sue the said defendant in the said case, and to attach or garnish the property of the World's Fair Mining Company in the said case, and to cause injunction to issue against the World's Fair Mining Company in said case, and the right of the World's Fair Mining Company and its assignors of the contracts described in the pleadings herein to have and retain the said Twelve ($12.00) Dollars per ton upon all ore shipped by it from said World's Fair mines were directly in issue and were each and all decided against the said Frank and Josephine Powers and in favor of the said World's Fair Mining Company.

Wherefore, this Plaintiff prays judgment as aforesaid for
39 One Hundred and Eighty-five ($185.00) Dollars and costs.

FRANK H. HEREFORD,
FRANK E. CURLEY,
Attorneys for Plaintiff.

Filed in Open Court by Stipulation, May 26th, 1908.

Stipulation.

(Title of Cause.)

It is Hereby Stipulated in the above entitled action, and the parties hereto consent that an order be entered upon the minutes of the above entitled court, transferring for trial to the District Court of the First Judicial District of the Territory of Arizona, in and for the County of Pima, this action.

This stipulation is without prejudice to the rights of either parties

hereto to raise any question in the court to which said action is transferred, whether it be a question of jurisdiction or other question of law or fact.

Dated, Tucson, Arizona, February 4, 1907.

FRANK H. HEREFORD,
Attorney for Plaintiffs.
EUGENE S. IVES,
Attorney for Defendant.

Filed February 13, 1907.

Verdict.

(Title of Cause.)

We the jury duly empaneled and sworn in the above en-
40 titled case upon our oaths do find for the defendants.

S. Y. BARKLEY, *Foreman.*

Filed May 28, 1908.

Judgment.

(Title of Cause.)

This cause came for trial before the above named Court, and a jury duly impanelled to try the same, on the 25th day of May, 1908, Frank H. Hereford and Frank E. Curley appearing as attorneys for the plaintiff, and Eugene S. Ives and S. L. Pattee appearing as attorneys for the defendants. Thereupon evidence was introduced on behalf of the plaintiff and the plaintiff rested its case, and at the close of the plaintiff's case the defendants moved the court to direct the jury to return a verdict in favor of the defendants, which motion was granted, and thereupon the jury did, on the 28th day of May, 1908, by direction of the court, return a verdict in favor of the defendants, and judgment was ordered to be entered in accordance with said verdict.

Now, therefore, pursuant to said verdict and order for judgment, it is hereby

Ordered, Adjudged and Decreed that plaintiff take nothing by this action, and that the defendants go hence without day.

And it appearing that heretofore, pursuant to an order of this court, the said plaintiff duly filed a bond to secure the payment of the costs of this action, conditioned as required by law and
41 executed by said plaintiff as principal, and M. P. Freeman and H. B. Tenney as sureties, it is further ordered, adjudged and decreed that the defendants to have and recover of and from the above named plaintiff and said M. P. Freeman and said H. B. Tenney, and each of them, the costs of this action, taxed at the sum of Three Hundred and Thirty Two and fifty-five one hundredths Dollars ($332.55), and that they have execution therefor.

Done in open Court this 28th day of May, 1908.

JOHN H. CAMPBELL, *Judge.*

Filed June 3, 1908.

Motion for New Trial.

(Title of Cause.)

Now comes the plaintiff, World's Fair Mining Company, a corporation, and moves for a new trial herein upon the following grounds:

1. That the Court erred in admitting evidence.
2. That the Court erred in rejecting evidence.
3. That the Court erred in charging the jury.
4. That the Court erred in instructing the jury to find and return a verdict for the defendants, and each thereof.
5. That the evidence does not sustain the verdict as against plaintiff.

42 6. That the verdict against the plaintiff is contrary to the evidence.

FRANK H. HEREFORD,
FRANK E. CURLEY,
Attorneys for Plaintiff.

Filed June 1, 1908.

Minute Entries of the Trial Court.

(Title of Cause.)

Be it remembered that heretofore and upon to-wit: the 11th day of December, A. D., 1906, the same being one of the regular juridical days of the December, 1906, Term of said Court, the following order inter alia was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

No. 406. The World's Fair Mining Company, a corporation, Plaintiff, vs. Frank and Josephine Powers, Defendants.

A motion for a new trial herein having been filed by plaintiffs herein and said motion having been ordered and submitted in Chambers, and briefs having been prepared by respective counsel and given careful consideration by the Court, and the Court being fully advised herein does now in open court counsel for the various parties being present, Frank H. Hereford, Esq., counsel for the plaintiffs being represented by Selim M. Franklin, Esq., and Eugene S. Ives, counsel for defendants, ordered that said motion for a new trial be and is hereby granted.

43 And afterwards, and upon, to-wit: the 2nd day of April, A. D., 1907, the same being one of the regular juridical days of the April, 1907, Term of said Court, the following order inter alia was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

No. 406. The World's Fair Mining Company, a corporation, Plaintiff, vs. Frank and Josephine Powers, Defendants.

Upon motion of plaintiff herein and in accordance with the stipulation filed hereinbefore, it is ordered by the Court that further

trial of this cause be and the same is now transferred to the District Court of the First Judicial District of the Territory of Arizona in and for the County of Pima, and the Clerk of this Court is hereby instructed to forward all the papers and a transcript of the proceedings in this case to the Clerk of said Court at Tucson.

(The original papers and transcript in this case were in accordance with the above order transmitted to and filed in the office of the Clerk of the District Court of the First Judicial District in and for the County of Pima, on April 8, 1907, and this case was filed and docketed in said Court and numbered 4147.)

And afterwards, and upon, to-wit: the 15th day of February, 1908, the same being one of the regular juridical days of the October, 1907 Term of said Court, the following order inter alia was had
44 and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

4147. The World's Fair Mining Company, a corporation, Plaintiff, vs. Frank Powers, et al., Defendants.

It is ordered that the motion of the defendants to require the plaintiff herein to give security for costs herein be set for hearing on Saturday, February 29, 1908, at 9:30 o'clock A. M.

And afterwards, and upon, to-wit: the 29th day of February, 1908, the same being one of the regular juridical days of the October, 1907, Term of said Court, the following order inter alia was had and entered of record in said Court in said cause which said order is in words and figures as follows, to-wit:

4147. The World's Fair Mining Company, a corporation, Plaintiff, vs. Frank Powers, et al., Defendants.

Upon motion of Eugene S. Ives, Esq., counsel for the deefndants herein it is ordered that the plaintiff herein be required to give good and sufficient security for costs herein.

And afterwards, and upon to-wit: the 7th day of March, 1908, the same being one of the regular juridical days of the October, 1907 Term of said Court, the following order inter alia was had
45 and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

4147. The World's Fair Mining Company, a corporation, Plaintiff, vs. Frank Powers, et al., Defendants.

It is ordered by the Court that this case be set for trial by jury on Monday, April 20th, 1908, at 9 o'clock A. M.

And Afterwards and upon, to-wit: the 9th day of April, 1908, the same being one of the regular juridical days of the October, 1907 term of said Court, the following order inter alia was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

4147. The World's Fair Mining Company, a corporation, Plaintiff, vs. Frank Powers, et al., Defendants.

It is by the court ordered that the order heretofore made setting this case for trial by jury on Monday, April 20, 1908, be and the same is now vacated; and it is further ordered that this case be and the same is now continued for the term.

And Afterwards, and upon, to-wit: the 16th day of May, 1908, the same being one of the regular juridical days of the October, 1907 Term of said Court, the following order inter alia was had and
46 entered of record in said court in said cause, which said order is is words and figures as follows, to-wit:

4147. The World's Fair Mining Company, a corporation, Plaintiff, vs. Frank Powers, et al., Defendants.

It is ordered that this case be set for trial by jury on Monday, May 25th, 1908, at 9 o'clock, A. M.

And Afterwards, and upon, to-wit: the 25th day of May, 1908, the same being one of the regular juridical days of the April, 1908, Term of said Court, the following order inter alia was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

4147. The World's Fair Mining Company, a corporation, Plaintiff, vs. Frank Powers, et al., Defendants.

This case came on this day regularly for trial, Frank H. Hereford, Esq., and F. E. Curley, Esq., appearing as counsel for the plaintiff, and Eugene S. Ives, Esq., and S. L. Pattee, Esq., appearing as counsel for the defendants, and both parties announce ready for trial. Whereupon the clerk was ordered to draw twenty names from the box wherein he had deposited in the presence of the Court the names of the jurors summoned, and not excused, and the
47 names of twenty persons were thereupon drawn and all answering thereto, respectively, took their places in the jury box. The said jurors were then sworn and examined on their voir dire. Charles F. Hoff was thereupon challenged and excused for cause and the clerk then drew from the box the name of William B. Coberly who was duly sworn and examined on his voir dire. The panel being now full and complete, the said jurors in the jury box having been passed for cause by both the plaintiff and the defendant, the respective parties exercised their right of peremptory challenge, and the following named persons were called according to law to constitute the jury, viz:—G. Quicken-tedt, F. J. Sinclair, Ira P. Lambing, W. L. Hanson, Thos. O. Clark, Geo. B. Knight, Louis Tallman, Manuel Leon, H. Urquides, Ozra A. Haskins, S. Y. Barkley and William B. Coberly, who were duly sworn to well and truly try the issues joined between the plaintiff and the defendant herein. Counsel for the plaintiff then read the complaint and made a statement of the plaintiff's case to the jury. Counsel for the defendants then read the defendants' answer and made a statement of the defendants' case to the jury. Counsel for the plaintiff then read the plaintiff's reply to the jury, and the plaintiff then to maintain upon its part the issues herein, introduced certain documentary evidence and called as a witness Frank Powers, one of the defendants, who was duly sworn examined and cross examined, according to law, and this being the usual hour of recess, the Court duly ad-
48 monished the jury, according to law, and thereupon excused them until Tuesday, May 26, 1908, at 9:00 o'clock A. M., to which time the further trial of this case is now ordered continued.

And Afterwards, and upon, to-wit: the 26th day of May, 1908, the same being one of the regular juridical days of the April, 1908 Term of said Court, the following order inter alia was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

4147. The World's Fair Mining Company, a corporation, Plaintiff, vs. Frank Powers, et al., Defendants.

This matter came on this day regularly to be heard upon the motion of the defendants to strike from the reply of the plaintiff herein the amendment attached to said reply on this day, in accordance with the stipulation made in open court by counsel for the respective parties hereto, Frank H. Hereford, Esq., appearing as counsel for the plaintiff, and Eugene S. Ives, Esq., for the defendants, and said matter being fully submitted to the Court without argument said motion was by the Court overruled.

And Afterwards, and upon, to-wit: the same day the following other order was had and entered of record in said Court in
49 said cause, which said order is in words and figures as follows, to-wit:

4147. The World's Fair Mining Company, a corporation, Plaintiff, vs. Frank Powers, et al., Defendants.

This matter came on this day regularly to be heard upon the demurrer of the defendants to the amendment attached to the reply of the plaintiff herein on this day, Frank H. Hereford, Esq., appearing as counsel for the plaintiff, and Eugene S. Ives, Esq., for the defendants, and said matter being fully submitted to the Court without argument said motion was by the Court overruled.

And Afterwards, and upon, to-wit: the same day the following other order was had and entered of record in said Court in said cause, which said order is in words and figures as follows: to-wit:

4147. The World's Fair Mining Company, a corporation, Plaintiff, vs. Frank Powers, et al., Defendants.

Upon motion of Eugene S. Ives, Esq., counsel for defendants herein, it is by the Court ordered that Ray Ferguson, Manager of the defendant corporation be required to produce as soon as possi-
50 ble all records and books of said corporation in his possession.

And Afterwards, and upon, to-wit: the same day the following other order was had and entered of record in said Court in said cause, which said order is in words and figures as follows: to-wit:

4147. The World's Fair Mining Company, a corporation, Plaintiff, vs. Frank Powers, et al., Defendants.

This case having been continued from yesterday's session of this Court, come now the same parties hereto and come also the jurors herein, their names are called and all answering thereto respectively, the further trial of the case proceeds as follows: The plaintiff to further maintain upon its part the issues herein recalled as a witness Frank Powers, one of the defendants who was further examined and cross examined, according to law, and also read to the jury certain written testimony, and this being the usual hour of recess the Court

duly admonished the jury according to law and thereupon excused them until Wednesday, May 27, 1908, at 9:30 o'clock, A. M., to which time the further trial of this case is now ordered continued.

And Afterwards, and upon, to-wit: the 27th day of May, 1908, the same being one of the regular juridical days of the April,
51 1908 Term of said Court, the following order inter alia was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

4147. The World's Fair Mining Company, a corporation, Plaintiff, vs. Frank Powers, et al., Defendants.

This case having been continued from yesterday session of this Court, come now the same parties hereto and come also the jurors herein, their names are called and all answering thereto, respectively, the further trial of the case proceeds as follows: The plaintiff to further maintain upon its part the issue herein read certain written testimony to the jury, and recalled as a witness Ray Ferguson, who was further examined and cross examined, and recalled as a witness Frank Powers, one of the defendants who was further examined and cross examined, according to law, and also introduced certain documentary evidence, and the defendants introduced certain documentary evidence in connection with their cross examination, and thereupon the plaintiff rested its case. Counsel for the defendants then moved the Court to direct a verdict in favor of the defendants. And this being the usual hour of recess the court duly admonished the jury, according to law, and thereupon excused them until Thursday, May 28, 1908, at 9 o'clock, A. M., to which time the further
52 trial of this case is now ordered continued.

And Afterwards, and upon, to-wit: the 28th day of May, 1908, the same being one of the regular juridical days of the April, 1908 Term of said Court, the following order inter alia was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

4147. The World's Fair Mining Company, a corporation, Plaintiff, vs. Frank Powers and Jose- Powers, Defendants.

This case having been continued from yesterday's session of this court, come now the same parties hereto and come also the jurors herein, their names are called and all answering thereto respectively, the further trial of the case proceeds as follows: Argument of the respective counsel was had upon the motion of counsel for the defendants to direct the jury to return a verdict in favor of the defendants, and said matter being fully submitted to the Court and the Court being fully advised in the premises does grant said motion. Whereupon the Court directed the jury to return a verdict in favor of the defendants and said jury without retiring through their foreman presented their verdict. Whereupon said ver*i*dct was ordered recorded as follows, to-wit:

53 No. 4147.

"THE WORLD'S FAIR MINING COMPANY, a Corporation, Plaintiff,
vs.
FRANK POWERS and JOSEPHINE POWERS, Defendants.

We the jury duly empaneled and sworn in the above entitled cause upon our oaths do find for the defendants.

S. Y. BARKLEY, *Foreman.*"

And the Court inquiring of said jurors whether such is their verdict they say that it is and so say they all, whereupon said jury was ordered discharged from the case.

And afterwards, and upon, to-wit: the same day the following other order was had and entered of record in said Court in said cause which said order is in words and figures as follows, to-wit:

4147. The World's Fair Mining Company, a corporation, Plaintiff, vs. Frank Powers, and Josephine Powers, Defendants.

The Jury having returned a verdict in favor of the defendants it is ordered that judgment be entered herein in favor of the
54 defendants and against the plaintiff in acordance with said verdict.

And afterwards, and upon, to wit: the same day the following other order was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

4147. The World's Fair Mining Company, a corporation, Plaintiff, vs. Frank Powers, et al., Defendants.

It is hereby ordered that the Clerk deposit with the Treasurer of Pima County, Arizona, the sum of One Hundred and Forty-four Dollars ($144.00), being the amount deposited with him as a jury fee by the defendants herein a jury having been demanded by the plaintiff and having appeared for the trial of this case.

And afterwards, and upon, to-wit: the 6th day of June, 1908, the same being one of the regular juridical days of the April, 1908 Term of said Court, the following order inter alia was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

4147. The World's Fair Mining Company, a corporation,
55 Plaintiff, vs. Frank Powers, et al., Defendants.

It is ordered that the motion of the plaintiff for a new trial herein be set for hearing on Saturday, June 13, 1908, at 9:30 o'clock, A. M.

And afterwards, and upon, to-wit: the 13th day of June, 1908, the same being one of the regular juridical days of the April, 1908 Term of said Court, the following order inter alia was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

4147. The World's Fair Mining Company, a corporation, Plaintiff, vs. Frank Powers, et al., Defendants.

This matter came on this day regularly to be heard upon the exceptions of the plaintiff to the cost bill of the defendants herein, F. H. Hereford, Esq., appearing as counsel for the plaintiff, and Eugene S. Ives, Esq., for the defendants. And said matter being fully submitted to the Court without argument and the Court being fully advised in the premises, does overrule said exceptions.

And afterwards, and upon, to-wit the same day the following other order was had and entered of record in said Court in
56 said cause, which said order is in words and figures as follows, to-wit:

4147. The World's Fair Mining Company, a corporation, Plaintiff, vs. Frank Powers, et al., Defendants.

Comes now the plaintiff herein and through its counsel excepts to the ruling of the Court, overruling its exceptions to the cost bill of the defendants herein, and gives notice of appeal to the Supreme Court of this Territory.

And Afterwards, and upon, to-wit: the same day the following other order was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

4147. The World's Fair Mining Company, a corporation, Plaintiff, vs. Frank Powers, et al., Defendants.

This matter come on this day, regularly to be heard upon the motion of the plaintiff for a new trial herein, F. H. Hereford, Esq., appearing as counsel for the plaintiff, and Eugene S. Ives, Esq., for the defendants. And said matter being fully submitted to the Court without argument and the Court being fully advised in the premises does overrule said motion.

And Afterwards, and upon, to-wit: the same day the
57 following other order was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

4147. The World's Fair Mining Company, a corporation, Plaintiff, vs. Frank Powers, et al., Defendants.

Comes now the Plaintiff herein through its counsel F. H. Hereford, Esq., and excepts to the ruling of the Court in overruling its motion for a new trial herein, and gives notice of appeal to the Supreme Court of this Territory.

And Afterwards, and upon, to-wit: the same day the following other order was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

4147. The World's Fair Mining Company, a corporation, Plaintiff, vs. Frank Powers, et al., Defendants.

By consent of counsel for the respective parties hereto it is ordered that the plaintiff herein be and it is hereby granted ninety (90) days from this date in which to file with the Clerk of this Court a Statement of Facts, or a Transcript of the reporter's notes in
58 this case.

Abstract of Testimony.

(Title of Cause.)

It is stipulated by and between counsel for the respective parties hereto that the minute entries contained upon the records of the court in Santa Cruz County shall be sent to this court, and that either party may save his exceptions to the rulings of the court made at the former trial of this cause in the County of Santa Cruz as though said minutes were now here in court.

It is stipulated that either party can read the testimony from the transcript in the former trial of this case (there are two cases, the case of Powers against The World's Fair Company, and the case of The World's Fair Company against Powers), subject to objections on the ground of materiality and competency; there is to be no objection as to the form of the questions except as to materiality and competency.

Plaintiff introduced in evidence without objection being offered the agreement of September 4th, 1903, signed by Ray Ferguson, Frank Powers and Josephine Powers, which was admitted and marked Plaintiff's Exhibit "A".

It is stipulated by and between counsel for the respective parties that The World's Fair Mining Company was organized as a corporation on April 15th, 1904; that it is still a corporation, and
that Frank and Josephine Powers are still the owners of the
59 World's Fair group of mines. And it is further stipulated
that the agreement of September, 4th, 1903, was assigned to the London-Glasgow Development Company on February 9th, 1904.

FRANK POWERS testified on cross-examination, being called by plaintiff for that purpose:

I am the defendant in this case. I am the same Mr. Powers who signed the contract of September 4th, 1903. With respect to the mining works on the mine, the house reserved by me in the contract lays east and west, and the back of the house lays to the south, and the end of it lays to the east, and the front of it to the north. The house is about twenty-five feet from the tunnel opened on the mine workings. The ore dumps on the property at the time the contract was made were from fifty to seventy-five feet from the house, all in plain sight of the house. The machinery is there also in that vicinity, and obstructed the view of the tunnel from the house. About the 15th of April, 1904, I went to Mr. Ives' office in Tucson with Dr. Ferguson and others, about the business on this contract. I participated in the formation of the World's Fair Mining Company, and was elected one of the directors. I know that the World's Fair Mining Company was formed for the purpose of taking over the contract, the one I gave Dr. Ferguson. Me and my wife went to Mr. Ives' office about the formation of the World's Fair corporation, and there met Dr. Stuart and Dr. Ferguson,
and his wife. At the time and prior to the forming of the
60 World's Fair corporation we discussed a good many matters
in regard to it.

Q. Did you at the time notify the World's Fair Mining Company, or any one for it, that this contract had been broken in any way, shape or from, by any of Dr. Ferguson's assignees?

A. I don't think so at that time: I don't remember of it.

I participated in the working and forming of The World's Fair Mining Company for the purpose of taking over this contract for the sale of the mines—the one of September 4th—the one I gave Dr. Ferguson.

Q. At the time you did that did you notify The World's Fair Mining Company, or anyone else that you claimed that the contract was broken and void?

Mr. IVES: I object to the question on the ground that it assumes that he at that time claimed it to be broken.

The COURT: He may answer the question.

The WITNESS: I don't understand what the question means, exactly.

Mr. HEREFORD:

Q. At the time—I am referring simply to the time about April 15th when you formed The World's Fair Mining Company. There was then this contract with Ray Ferguson which had been assigned to the London-Glasgow Company; now did you tell The World's Fair Mining Company, or any of its directors, Dr. Booth or Dr. Stuart, that you claimed that the contract was forfeited?

61 A. No, sir, not that I know of.

Q. Did you ever make a claim to any of those gentlemen that the contract was forfeited?

A. No, sir, not that I know of.

Sometime after we formed this corporation in Tucson, The World's Fair Mining Company took possession of the mines, I was out there and saw them ship some ore.

It is admitted that this paper presented to the witness is the paper that was signed on or about the 15th day of April, 1904, by Frank Powers, Josephine Powers and Ray Ferguson.

The WITNESS (continuing) testified: Previous to the signing of this paper which are the escrow instructions, I had lots of talk and discussion with Dr. Ferguson in regard to the $12.00 a ton. I was claiming the $12.00 a ton didn't belong to them until the machinery went up to treat the ore. After the machinery went up I was to pay them $12.00 a ton. That was my plain understanding. If I hadn't understood it that way I wouldn't have gone into the proposition. I claimed that the $12.00 a ton was for the treatment of the ore at the mine and they were claiming that the $12.00 a ton was for all the ore they shipped. I don't know what they were claiming it for. We argued that over in Tucson for one day and then the next day. After that I signed this escrow agreement.

62 Plaintiff introduced in evidence without objection being offered escrow agreement dated May 15th, 1904, and signed by Frank Powers, Josephine Powers, and Ray Ferguson, the fact that it was not a certified copy and not proven according to law, hav-

ing been waived by counsel for the defendants. The escrow agreement was admitted in evidence marked Plaintiff's Exhibit "B".

The WITNESS (continuing) testified: After the escrow instruction was signed and the World's Fair Mining Company organized I returned out to the mines to my cottage, and The World's Fair Mining Company was at work and kept at work. They shipped two carloads of ore. They had got a couple of good carloads of ore. It was out of the place I had opened up. They were working down there.

Q. Then after that, or about that time didn't you out there at the mine have a conversation with Mr. Rawson, Mr. Z. F. Rawson, in which you said: That if you could get someone to advise you to fight this you would fight it and stop them working. You were in his room out there at the time; it was about the latter part of April or the 1st of May. After this the World's Fair Mining Company was formed. Did you not say to him: "If I could get someone to advise me to fight this I would fight it and I would stop them working"; and didn't Mr. Rawson say to you: "On what ground?" And didn't you say: "Because you are not entitled to this $12.00 a ton." And didn't you then say to Rawson: "If I could find
63 a lawyer to advise me to fight it I would do so." And didn't Rawson say to you: "I will advise you not to do so;" and didn't Rawson say further: "If you do they will beat you and if they beat you they will have ground for damages." And didn't you reply: "If they do beat me they will have ground for damages." Did you not say that to Rawson?

A. I don't remember of saying a word of it.

Q. Later on a day or two after that didn't you have another conversation with Rawson at the same place and didn't you say to him: "I have found a lawyer who has advised me to fight it and I'm going to do it! I have got my lawyer who advised me to fight," or words to that effect. Didn't you make that statement?

A. I don't remember it.

Q. Oh yes; then didn't the conversation go on and did he not in reply say: "If you do it and the company beats you they will be able to come with a damage suit against you." And didn't you say: "I don't care if they do; I am going to fight them anyhow." Didn't you make that statement?

A. I don't remember of it.

Q. Well about a month or two after this you did bring a suit, didn't you, against the Worlds Fair Mining Company, and the London-Glasgow Company and Ray Ferguson?

A. Yes; I brought a suit. If you will let me answer the question what Rawson did tell me I will tell it.

64 The COURT: Never mind.

Mr. HEREFORD:

Q. Mr. Powers is that your signature on that there? (Handing witness paper.)

A. Yes, sir, it looks like it.

Mr. HEREFORD: I now offer the complaint in that case in evidence.

Mr. IVES: We object to this, if your Honor please. I will object to all other proceedings relating to this on the ground first: The complaint does not state facts sufficient to constitute a wrongful or malicious attachment. Second: That this was not an action upon the bond for atachment, and that the remedy of the plaintiff is limited to an action on the bond to secure damages. Or if he claims that it was without cause and malicious to recover the damages he claims he suffers by reason of the attachment.

Argument by counsel.

Mr. IVES: It is admitted by us that they did fifty feet of work up to the time Mr. Powers took possession.

The COURT: Then what are the breaches you claim that gave you the right to take possession?

Mr. IVES: Why they took our money and kept it. The other is that they let the water come up in the property. The chief breach is that they took the money and kept it.

Argument by counsel.

The COURT: Now what is the objection.

Mr. PATTEE: The complaint in this case does not arise out
65 of the attachment or any proceedings under the attachment or the injunction, or the garnishment, for the reason that it is neither an action on the bond, nor an action for malicious prosecution. The complaint fails to contain the allegations necessary in an action for the malicious and unlawful misuse of the process by attachment, and such a cause of action, if it might be stated, would be wholly inconsistent. Then I will add another ground: that the bringing of the suit, the issuance and levy of the writ of attachment and garnishment as alleged, and the issuance and service of the Writs of Injunction as alleged, and all the proceedings had in that action, do not constitute any breach of any covenant of this contract. It is incompetent, immaterial, and irrelevant generally and specifically for the reasons already stated.

Argument by counsel.

The COURT: I regard this as a very important part of the case. You may proceed with your testimony and I will rule upon the question later on.

The WITNESS (continuing) testified:

In July, 1904, the World's Fair Mining Company was still working on the mines. Sometime during the month I armed myself with a rifle and a six shooter and went to the employees of the World's Fair Mining Company and told them I would not allow them to work or do anything over there. At the same time I posted a notice on the property in the following language: "Notice is hereby given
66 that there is no admission to this property, The World's Fair Mines, except by permission of the undersigned owners. Frank Powers and Josephine Powers."

I posted the notice in the morning between the time the night shift had gone off and the morning shift came on.

Q. At that time did you not say to some of the people there work-

ing for the World's Fair Mining Company: "You boys can go along"—No; "I am going to stop the men from going on my premises?"

A. Excuse me, on that point. Those two men that I told that to were the keepers of the Sheriff.

Q. Wasn't a man by the name of Henderson at that time employed by the World's Fair Mining Company?

A. He was.

Q. Did he not at that time go down and start a fire under the boiler of the hoist?

A. Yes, sir, he did.

Q. Did you not say: "You cannot start a fire in there this morning?"

A. Yes, sir, I did.

Q. Did you not afterwards state to the Mexicans and to others in the employ of the Worlds Fair Mining Company that they could not go to work there?

A. Yes.

At that time there was a man by the name of Captain Thomas there in charge of the Worlds Fair Mines. He came to me and said after I notified them: "Can't I take a copy of this notice—copy of
67 this you posted?" And I said, "Yes."

He said: "Do you know what you are doing here." I said: "Yes, sir." He said: "Have you any orders from anybody, to do this business?" And I said: "Yes, sir; I have. I think I am taking orders from myself." He said: "You are responsible for this," and I said: "Yes, I am." I afterwards went to him and made him give up the keys and possession of the houses the men were occupying. I am not in the habit of carrying fire arms out there. I especially put them on that morning. I was in the habit of measuring each month the work done. I don't think there was a month in which they had not done all the work as claimed they should have done under the contract.

Defendants admit that up to the time Powers took possession of the mines, the fifty feet of work per month was done according to the terms of the contract.

Q. Now after you told those men to leave the mine about that time was there any ore at the railroad station down at Patagonia that had been shipped to the railroad company?

Mr. IVES: I object to that.

The COURT: Objection is overruled.

Exception by Defendant.

The WITNESS:

A. I think so.

Q. At that time was it under attachment?

Mr. IVES: I object to the question on the same grounds as stated before.

68 Argument by counsel.

The COURT: I will overrule the objection.

Mr. HEREFORD: I will avow that I do not know whether the attachment was put on by Mr. Powers or by some one else. It is just for the purpose of identifying the ore.

The COURT: For that purpose only it may be admitted.
Mr. IVES: We take exceptions to the ruling.

The WITNESS:

A. I am not sure whether it was under attachment by me or Chris. Wilson, or Thomas.

Q. Well, irrespective of who attached it, was it under attachment?
A. It was not under attachment at that time.
Q. It was not?
A. It was not, I think.
Q. Now, do you know what became of that ore?

Mr. IVES: I object to that. It appears that it was under attachment before he took possession.
The COURT: The objection is overruled.

The WITNESS:

A. Yes.

Mr. HEREFORD:

Q. What became of it?

A. I paid Chris Wilson for the hauling of it and I shipped it.
Mr. IVES: Now, I again renew my objection on the ground that the complain-t is not seeking to recover the value of this ore and there is no other theory on which it is admissible.
Mr. HEREFORD: I am seeking to prove that the ore passed out of our possession through the fault of this defendant, and we can
69 recover it. That is all I seek to show. I do not even seek to show the value of it at this time. I am simply seeking to show that he took that ore and we could not get it.
The COURT: The objection is overruled.
Mr. IVES: Our grounds of objection are the same grounds we gave at length before.

Mr. HEREFORD:

Q. Now I do not want to ask you how much the proceeds were, or anything of that kind, but what became of the proceeds from that ore?

A. I shipped the ore to the smelter at El Paso——

Mr. IVES: Wait a minute; we object to the question.
The COURT: The objection is overruled.
Mr. IVES: We except to the ruling of the Court.

The WITNESS: Now, if you will excuse me, I think I have made a mistake there. I want to correct it. Now, to tell you I ain't sure whether that ore was shipped to El Paso or to Selby's.
Mr. HEREFORD: Well, it was shipped to some smelter?
A. Yes, sir, but I can't swear to which one.
Q. What became of the smelter returns and proceeds of that ore?

Mr. IVES: I object to the question.
The COURT: The objection is overruled.
Mr. IVES: We except to the ruling.

The WITNESS:

A. We received it.

My wife and I received it. I never paid the World's Fair Mining Company any of it. At the time I took possession of the mines with my rifle and six shooter on the 25th of July, there was some
70 copper ore broken there on the dump that had been broken by The World's Fair Mining Company and left there.

Q. What, if anything, became of it?

Mr. IVES: We make the same objection as before.

The COURT: The objection is overruled.

Mr. IVES: We take exception to the ruling.

The WITNESS: I put my men to work there and assorted out the ore. I shipped it to some smelter and received the proceeds and returns. I did not pay them to the Worlds Fair Mining Company or any one for them. The Worlds Fair Mining Company had put in some machinery, we called it second hand machinery, and timbered the mine. They took some of the timber out of the mill to timber it with.

Q. Did they buy and bring there a lot of other machinery, and timber?

A. Yes.

Mr. IVES: I object to that as wholly immaterial.

The COURT: The objection is overruled. He may answer.

Mr. IVES: May I assume that it is overruled on the ground that their complaint does state a cause of action?

The COURT: No.

The WITNESS testifying continued:

They had done between 400 and 500 feet of work in the
71 mine under the contract before July 25th, 1904, when I took possession of the mine. The main level mentioned in the contract is a tunnel that runs into the mines pretty near a thousand feet, and work was done in a shaft or winze. We had to go into the tunnel about 750 feet before reaching the mouth of the shaft. There was water in the shaft at that time this contract was entered into. It had to be pumped out and more or less timbering done to prop up the loose dirt. After The Worlds Fair Company was organized and the escrow agreement was signed I believe Dr. Stuart asked me if I was perfectly satisfied with everything that was going on there and I said: "The boys are doing the best they can, and when they do that, that is all I can ask. I believe I had a conversation in this city on the 17th day of March, 1904, with Mr. Booth, and asked him about whom the gentlemen were that were going into this proposed Worlds Fair Mining Company, and he told me that Dr. Stuart was one of them; that he was a man of large resources financially and he spoke of the other members of the syndicate, and told me that Mr. Tearse was Treasurer, and a large stockholder and a man of large resources, and Mr. Webber and Mr. Fields of Chicago. He told me that he was in the banking business.

Q. In the banking business; yes, now I believe that is all. Coming up to this other question and the—I desire to read to the Court

some authorities upon the question objected to a while ago
72 and which the Court desired authority for. (Referring to defendant's objection to the offer as evidence on the part of plaintiff of the complainant in the case of Frank and Josephine Powers vs. The Worlds Fair Mining Company and Ray Ferguson.) Reads authorities.

The COURT: I think for the present I shall sustain the objection, until I have the opportunity to further consider. I may change my views. If so I shall advise you. For the present and for the purposes for which it is offered I shall sustain the objection.

Mr. HEREFORD: Now I want to offer the complaint just referred to and I want to offer the different affidavits on attachment and the different affidavits on injunction, signed and sworn to by Mr. Powers, and I want to offer the attchments themselves issued in the case, and the returns of the officers thereon, and I want to offer the order dissolving the injunctions, and the different minute entries thereon. I want to offer the answer of the defendant, the object of which I will state in my avowal. I want to offer the amended complaint and then I want to offer the judgment itself.

Mr. IVES: What judgment do you mean?

Mr. HEREFORD: The judgment which was rendered yesterday.

Mr. IVES: I object to it all.

The COURT (to Mr. Ives): Have you examined this judgment?

Mr. IVES: I have not.

73 The COURT: Do you desire that I should excuse the jury at this time?

Mr. HEREFORD: Mr. Ives does and I think it will be well.

Mr. IVES: I make my objection to the offer on the same grounds as to the complaint. Have you an avowal to make in connection with these papers you have offered?

Mr. HEREFORD: Yes, sir.

The COURT: The jury will be excused for fifteen minutes.

Mr. HEREFORD: I avow that we expect to prove by the different papers offered that Frank Powers and Josephine Powers filed a complaint in the case against the Worlds Fair Mining Company and the London-Glasgow Development Company and Ray Ferguson, alleging that the London-Glasgow Development Company owned them six or seven thousand dollars, and that The Worlds Fair Company owed them six or seven thousand dollars—and Ray Ferguson owed them a small sum of money which was due, owing and unpaid, and making other necessary allegations to make a good complaint against the defendants separately; that Frank and Josephine Powers then caused affidavits of attachment to be sworn to and the writ of attachment to be levied by the sheriff, upon ore which the Worlds Fair Mining Company had extracted under its contract, and had a right to ship under its contract, some of it being at Patagonia, a dis-

tance of some miles where it had been shipped by The
74 Worlds Fair Company, and some at the mine itself; that it was also levied upon other property of different kinds belonging to The Worlds Fair Mining Company which they used in and about the carrying out of their contract; that at the same time

an injunction was issued in the same case, and was served on The Worlds Fair Mining Company; that this injunction was issued on affidavits verified by Frank Powers and other proper steps taken by Frank Powers and Josephine Powers and restrained The Worlds Fair Mining Company from, I believe, working or mining the said mines, at any rate, restraining them from extracting and shipping ore from said mines or any mine; that a writ of garnishment was issued in the case; that the affidavit of garnishment was signed by Mr. Powers and sworn to by him; that all the necessary bonds and papers were executed in the case; that at the time the garnishment was issued there was over seven thousand odd dollars belonging to the Worlds Fair Mining Company in the hands of the First National Bank of Nogales, in the Town of Nogales, County of Santa Cruz, Territory of Arizona, the bank with which the Worlds Fair Mining Company did its business, which was garnished in that proceeding by that writ of garnishment on the bank restraining it from paying out the money to The Worlds Fair Mining Company; that the return of the sheriff shows the attachment of the ore I refer to and the other property. I also offer in evidence the answer
75 of the garnishee, the First National Bank of Nogales; and I offer to prove by it that the garnishee had in its hands at the time of the garnishment the sum of over seven thousand dollars belonging to The Worlds Fair Mining Company. I then offer to prove by the answer of the defendants in the said case against The Worlds Fair Mining Company, the London-Glasgow Development Company, and Ray Ferguson, that defendants interposed a demurrer on the grounds that they could not be sued together, and an answer in which they affirmatively declared that they expected to use the money in said bank for the purpose of paying Frank and Josephine Powers the sum of six thousand and odd dollars, being the full amount which the said Frank and Josephine Powers were entitled to receive under their contract, and that this six thousand dollars was not due at the time the suit was instituted and the attachments and garnishments issued and the injunctions served, nor until nine days after the suit was brought and the attachments and garnishments issued and served, and that Frank and Josephine Powers therefore were without any right to maintain or institute the suit, but that it was prematurely brought. I offer to show that by these papers that defendants in that case expected and intended to pay to Frank and Josephine Powers every dollar to which the said Frank and Josephine Powers were entitled under the contract as soon as it became due; that they expected to use a large portion of the money in the bank at Nogales, (which was garnished)
76 for that purpose. I expect to prove that the defendants at that time affirmatively set up that they were entitled to $12.00 a ton out of all ores shipped; that they were willing to pay to Frank and Josephine Powers out of the money in the bank at Nogales, all that Frank and Josephine Powers claimed in their complaint, as due from The Worlds Fair Mining Company, except the $12.00 a ton; that notwithstanding the answer of the defendants no action was taken on the part of Frank and Josephine Powers to per-

mit the defendant, The Worlds Fair Mining Company, to withdraw from the service of that garnishment or to cause to be paid out of the money garnished to Frank and Josephine Powers the amount which The Worlds Fair Mining Company admitted that Frank and Josephine Powers would have been entitled to nine days after the suit was commenced and garnishment, attachments and injunctions served.

The COURT: I think that is material if it is offered for the purpose of showing why you did not make payment of the amount due under the contract.

Mr. HEREFORD: That is one of the reasons if the Court please.

The COURT: If that is an excuse for non-performance—if you offer it for that purpose——

Mr. HEREFORD: It is for that, among other purposes.

The COURT: I think this, that if you are required to pay
77 a certain sum of money under your contract on a certain day and in order to prevent you from doing that, they garnished and attached the money wrongfully, then I think you are entitled to show that fact as an excuse for not paying the money on that day.

Mr. HEREFORD: And I further offer to prove by the answer that the amount which The Worlds Fair Mining Company were willing at the time that it filed its answer and at all times, has been willing should be paid Frank and Josephine Powers, was the amount received from the shipment of ore, less the sum of $12.00 a ton, to which the Worlds Fair Mining Company were entitled. I also offer to prove by the said papers that the money garnished in that bank was all of the money that the Worlds Fair Mining Company had, and that it was prevented from utilizing that money for the purpose of complying with the terms of the contract, and paying it to Frank and Josephine Powers, within 15 days after the receipt of the money, viz: on June 6th, by the garnishment which was levied on June 11th preceeding the time for paying it into the Arizona National Bank of Tucson, was June 21. I offer to prove by these papers that before June 21, before the time for depositing the money in the Arizona National Bank at Tucson, this money was all garnished, and was all the money that The Worlds Fair Mining Company had, and in connection with this offer now and following it up with other evidence, that that was all the money that The Worlds Fair
78 Mining Company had available in this territory—in this territory for any purpose, and that the action of the defendants in that case in causing the attachments and garnishments to issue prevented The Worlds Fair Mining Company from making the payment which they were to make under the contract to the Arizona National Bank at Tucson, within the time in which they were to make it under the contract. I further offer to prove by these papers that thereafter and on demurrer, the right of the plaintiff in that case, the case of Powers against The Worlds Fair Mining Company, the London-Glasgow Company, and Ray Ferguson to attach The World's Fair Company or to garnish it for the debt of either of the plaintiffs, the London-Glasgow Company or Ray Ferguson was

denied; that the plaintiffs in that case, Frank and Josephine Powers filed an amended complaint eliminating the London-Glasgow Company and Ray Ferguson, as parties, and changing the amount sued for in their complaint from $15,000.00 to an amount less than the sum of money in the bank at that time; that no effort was made to have the writs of garnishment or attachment modified in any form, but they still continued to hold the money for a liability of $15,000.00. I then offer to prove that thereafter and upon the trial of the case yesterday, May 25, 1908, an order for judgment against plaintiff in the case of Powers against the Worlds Fair Mining Company was entered.

Mr. IVES: To that I make the special objection that it
79 appears from the record under our stipulation, that our motion for a new trial is pending.

The COURT: As to the rest of the offer?

Mr. IVES: I object to it on the grounds as stated. We object to it on the grounds that it is immaterial; on the ground that it does not tend to show any breach in the contract by the defendants in this action, or either of them; on the ground that there is nothing in the complaint to show that the attachment was gotten out maliciously or without probable cause, or that the complaint does not sufficiently state that it was gotten out maliciously or without probable cause, and that the complaint does not sufficiently state a cause of action by reason of the getting out of the attachment without probable cause or maliciously, and upon the ground that it is not an action which is brought upon the bond given upon the issuing of the attachment or the injunction; and on the further ground that the complaint not having set up a performance of the contract, it is not admissible at this time upon any theory of the case; as yet the non-performance of the contract by the defendant has not been proven and the non-performance of the contract by the plaintiff has not been proven by the defendant, and if it would be admitted upon the theory that it would be an excuse for non-performance it is premature.

The COURT: I am inclined now to sustain the objection.

Mr. HEREFORD: Further if your Honor pleases, the issuance of the attachments and injunctions prevented us from shipping the ore and extracting the ore, and I offered to show also that the
80 garnishment prevented us from the right to take our own money and pay our employees so that we could go ahead with the contract, and that we are unable to go ahead with the contract by reason of it.

The COURT: Counsel has stated in connection with this offer that one of the purposes of the offer is to show an excuse for the non-performance of certain requirements of the contract or I do not correctly understand you. That is one of the purposes of your offering this testimony as I understand you. Now, I am inclined to this view, that, you not having pleaded non-performance and excuse you may not at this time show it.

I will rule against you on the merits. I do think this might be admissable for the purpose of showing non-performance, but that you

not having pleaded non-performance and excuse may not show it at this time.

Mr. HEREFORD: Then we make the same offer for the general purposes of the case, and for the purpose of showing that we were deprived thereby by the different acts stated, of the right to extract the ore and obtain $12.00 a ton therefor, and of the benefit we were to be entitled to under the contract without breaking the contract.

Mr. IVES: We object to that on the same grounds stated before.

The COURT: I shall sustain the objection. Your remedy I think is upon the injunction bond. I have ruled on that to this
81 effect. It is not admissible at this time to show non-performance. In your complaint you have not alleged non-performance, and excuse, you are not now entitled to show it.

Mr. HEREFORD: We do not offer this to prove non-performance.

The COURT: And you do not offer it as an excuse for non-performance?

Mr. HEREFORD: I offer it as an excuse for non-performance, as proof of non-performance, and a deprivation of certain rights.

The COURT: I shall rule adversely to you.

Mr. HEREFORD: The record may show that we waive the fact that these rulings were made in the absence of the jury.

Mr. IVES: That is satisfactory.

The WITNESS testifying continued.

Since I have took possession of these mines in July, 1904, and from that time on I have maintained possession myself and refuse to give possession to The Worlds Fair Mining Company. I don't remember you (Mr. Hereford) demanding possession of the mines from me for and on behalf of the World's Fair Mining Company, during the first trial of the case of Powers against The Worlds Fair Mining Company at Nogales, in the court room. Since taking possession of the mines I have never told the Worlds Fair Mining Company or anyone for it that they could again take possession of the mines.

Q. Mr. Powers did you not receive, and have you not
82 ever since kept six or seven thousand dollars of the money that was deposited in the First National Bank in Nogales, to the credit of The World's Fair Mining Company, and which was subsequently garnished and remained there, and did you not receive it without authority or right expressed by anyone on behalf of the Worlds Fair Mining Company?

Mr. IVES: I object to that as calling on the witness for a legal conclusion.

The COURT: Yes that calls for a legal conclusion, the objection is sustained.

Mr. HEREFORD: Mr. Powers did you not receive some six thousand odd dollars from the First National Bank of Nogales, since the time you took possession of those mines in July, 1904?

Mr. IVES: I object to that as immaterial. Have you finished your question Mr. Hereford?

Mr. HEREFORD: Yes, sir.

Mr. IVES: It is not based upon any allegation of the complaint.

The COURT: I cannot see how it is material Mr. Hereford.

Mr. HEREFORD: I want to show that that seven thousand dollars, the entire amount was the property of The Worlds Fair Mining Company, the money it had received from the ore shipped from The Worlds Fair Mines under its contract; that notwithstanding the fact that the money was placed in that bank, to the credit of The Worlds Fair Mining Company, Mr. Powers succeeded in
83 getting it paid out to him and has ever since kept it, and in addition to that has not accounted for it to The Worlds Fair Mining Company.

The COURT: The objection is sustained.

Cross-examination by Mr. IVES:

Mr. Rawson was the man that furnished the money for Dr. Ferguson. He was interested in the Worlds Fair Mining Company. He was with them or supposed to be with them. He worked at the mine under the contract I made with Dr. Ferguson. He worked as book-keeper and general all around man.

Q. Now state all that occurred at the conversation with Mr. Rawson, with respect to which Mr. Hereford asks you the questions?

Mr. HEREFORD: Did any such conversation occur as I asked you about with Mr. Rawson?

A. Yesterday?

Q. Yes, sir?

A. Not that I remember of.

Mr. HEREFORD: Now I submit that he cannot testify.

Argument by counsel.

The COURT: My recollection is that he stated that he did say some of the things about which you asked him, and some things he said he did not say. Now, I think they are entitled to what he did say. He may state the conversation.

84 The WITNESS continuing testified:

Rawson told me that he put up some four thousand and some hundred dollars, I think that was the amount of money, when he started in there. There was some talk about Ferguson using that money or a part of it. He told me the money was used and was all gone, and nothing for it. Now, he says: "They are going to bounce me and I hav-n't anything to show for it." The only thing I can remember is he tried to sell some of my stock they had, that is all I remember he said.

Mr. HEREFORD: Under the stipulation we are allowed to attach this (amended complaint) to the regular pleadings instead of writing a new pleading.

Mr. IVES: Undoubtedly. And I am allowed to attach my amendment to the reply to it.

Mr. HEREFORD: Yes, I will file my amended reply under the stipulation of yesterday.

The COURT: It may be attached to the pleadings.

Mr. IVES: I move to strike out the demurrer, to-wit: my ground being that it is not final by reason of the fact that the motion for a new trial has not been disposed of.

The COURT: That raises a question of law. Do you care to be heard upon it?

Mr. IVES: No.

The COURT: Then I shall refuse to strike it out.

Mr. IVES: Then I demur to it, because it appears that the motion for a new trial is pending.

85 The COURT: The demurrer will be overruled.

Mr. IVES: I make as a further ground for my motion to strike it out, that it is entirely immaterial and surplusage.

The WITNESS continuing testified:

In the conversation I had with Mr. Rawson there was no mention of my trying to break the contract that I know of. Don't think it could have occurred and me not remember it. Don't remember having a conversation with him at any time in which I said I was going to break the contract.

Mr. HEREFORD: Now for the purpose of making the records straight I again offer in evidence the complaint and all the other documents I described, together with the judgment in the case.

Mr. IVES: I object to that on the grounds heretofore stated.

The COURT: The objection is sustained.

Testimony of Mr. Bracy Curtis, a Witness for the Plaintiff, Read from Transcript in Former Trial of This Case as per Stipulation.

My name is Bracy Curtis. I reside in Nogales, and am cashier of the First National Bank of Nogales, and was such in June, 1904. I received from the El Paso Smelter Works seven thousand, six hundred and seventy-two dollars and seventy-eight cents, on June 6th, 1904, for ore shipped by The Worlds Fair Mining Company. This money was garnished in my hands on June 11th, 1904, in the case of Frank Powers and wife against The Worlds Fair Min-

86 ing Company, and on May 27th, 1905, we paid to the sheriff out of this money an order of the court in the said garnishment proceedings the sum of $6,930.69, and on May 29th we paid to Charlie Wing, one of the other creditors, on order of the court the sum of $411.23, which cleaned up that account. On June 3rd, and before the deposit of the El Paso smelter draft was made, The Worlds Fair Company had a balance due them at the bank of $103.49, and on the 6th that deposit was made and a check charged up of $2.50. On June 11th when the money was garnished The Worlds Fair Company had a balance in the bank of $7,342.02, which amount was garnished and all paid out on the garnishments. The Worlds Fair Company had been doing business at the bank for some time.

Testimony of N. E. Webber, a Witness for the Plaintiff, Read from Transcript in Former Trial of This Case as per Stipulation.

My name is N. E. Webber. I reside at Winona, Minn. I am a practicing attorney. I have been engaged in practicing law for 25 years. I know the value of the contract that The Worlds Fair Mining Company had with Mr. and Mrs. Powers. I am one of

what is known as the Winona Syndicate. I first learned of the Worlds Fair Mining Company through Dr. Stewart. I don't know that I was ever interested in the London-Glasgow Company. After
87 Dr. Stewart returned to Winona, Minn., and had visited the mines and seen Mr. Powers he gave us a history of his visit and what he had seen. There was a number of preliminaries that were gone through. We discussed Mr. Ferguson's contract with Mr. Powers. The contract was sent up to Winona, defining Dr. Stewart's rights and that contract was executed. The contract itself, which is in evidence and my recollection is, that is the first I knew of the London-Glasgow Development Company. I have never visited the mines; I never saw Mr. Powers until I came into court. The Winona Syndicate is composed of Dr. D. A. Stewart, R. E. Tearse, J. W. Booth, W. J. Landon, H. H. Field, of Chicago, and myself. Dr. Stewart is an old timer of Winona, been there many years; has held a number of official positions there, as Mayor of the city, etc.; is a man of large financial resources, has large property interests in Winona, Dakota, and Minnesota; is a stockholder in several companies, and interested in Montana and Washington lands, Seattle and Spokane. Mr. Landon is in the wholesale and retail hardware business, is a director of the First National Bank and a stockholder therein; also has large real estate and other interests. Mr. Tearse is engaged in the wholesale business, as a director of the First National Bank of Winona, and a stockholder in other companies; owns real estate there and has large elevators and is regarded as a man of large means in Winona. and a stockholder in other companies; owns real estate there and has large elevators and is regarded as a man of large means in Winona. Mr. Booth has been cashier for a long time, of the deposit bank in
88 Winona and subsequently became cashier of the First National, one of the largest banks in the city, and has some real estate there and some stock in companies. He also owns a farm in New York State. Mr. Field is the Assistant Solicitor of the Chicago, Milwaukee and St. Paul Railroad Company, and has been for 18 years. He has a large salary and owns real property in Chicago; owns a ranch in Illinois and is one of two owners of about 30,000 acres of land in Wisconsin. He is interested in Seattle real estate and has stock in various companies. The Winona Syndicate is not a corporation. We are simply associated together in an ordinary business way. All the information I have received as to the Worlds Fair Mines is practically hearsay, except the smelter returns and the report of Mr. Rawson, and fom what Dr. Stewart and Mr. Booth, both of whom had visited the mines.

Q. Do you know what the value of the contract that the Worlds Fair Mining Company had with Mr. and Mrs. Powers is?

A. Yes, sir.

Q. Will you state that value?

Mr. IVES: Now I make my objection.

The COURT: I will sustain the objection.

Mr. HEREFORD: I avow that I will prove by the testimony that the Court has just excluded and that I offered in evidence that Mr.

Webber, the witness whose testimony I have just been reading from, knew the value of the contract that The Worlds Fair Mining
89 Company had with Mr. Powers being the contract upon which this case is based. I avow that he not only knew it but he knew what it could be sold for. I avow further that I could prove by this witness that he knew the value of the contract was $200,000.00, if the defendant had not taken possession of the property from The World's Fair Mining Company. I avow further, that I will prove that the defendants waived any and all right to show that Mr. Webber is not competent to give that evidence and for me to introduce it in this case by their objecting to and preventing him from stating the reason why he knew the contract was worth over Two Hundred Thousand Dollars as is shown by the transcript of his evidence here offered.

Mr. IVES: I object to it.

The COURT: The objection is sustained.

Testimony of D. A. Stewart, a Witness Called for the Plaintiff, Read from Transcript in Former Trial of This Cause as per Stipulation.

My name is D. A. Stewart. I reside at Winona, Minn.; I am a physician and surgeon. I am the same Dr. Stewart referred to as one of the Winona Syndicate. I have been in mining transactions before this one. My experience has been buying mines, and furnishing money for the development of mines with others. All the mines I have been connected with I have seen first or last before I have furnished any money. I would not be considered
90 an expert, but think I could distinguish good ore from poor ore any time. I have never made it a study. I first met Dr. Ferguson the latter part of December, 1903. I think it was about a week after that that I became interested in the company which they had, The Worlds Fair group of mines. I went to the mines the first of January, 1904, before I became interested. I went up there with Dr. Ferguson and went over the Worlds Fair group of mines. I went into the mine a little ways and then I came out and talked with Mr. Powers regarding the mine. Mr. Powers told me that the dump ore went in with the contract, that had been obtained by Dr. Ferguson. Then we came back to the Duquesne property with Mr. Stewart and Dr. Ferguson and the next day we came back to Nogales, and after that arrangements were made in contemplation of our taking up the proposition of furnishing the money to work the mine. I think the arrangements were made about the 5th or 6th of January. I then went to Minnesota and we formed the syndicate. We then furnished the money we had agreed to furnish and sent it to Dr. Ferguson. I returned here again about the 4th or 5th of April, 1904. I went to the mine and stayed there about ten days. I went into the lower workings twice and the upper workings, once. Mr. Frank Powers accompanied me into the upper workings. When we were going through the mine Mr. Powers showed me one large place that had been stoped

out, a sort of chamber pocket. I think he said he and his
91 partners had taken out of that one place $30,000.00. I went down into the mine twice with Mr. Powers. We examined the ore that they had taken out in different places. Mr. Powers suggested that certain work should be done on the lower part of the shaft; that they had better take out a tunnel that he had started to the south, which was afterwards done, as I believe. We took up several samples there and brought up and was satisfied it was a very good grade of ore.

Q. During that time did Mr. Powers make any expressions at all as to whether he was satisfied or dissatisfied with the way things were going on?

Mr. IVES: I object to that, it is immaterial.

The COURT: The objection is overruled.

The WITNESS (continuing) testified:

Yes, sir, he did.

After I had gone through the upper workings of the mine I had become a little anxious or worried that we could not keep up our preliminary work—with the work that we were compelled to perform under the conditions of our contract, so I insisted that Mr. Rawson who was then superintendent, to have him measure up the work done before I left for the North. I think that Mr. Powers went into the mine with him; don't know whether he helped him measure up the work or not, but they ascertained that there was forty or fifty feet more work done than was absolutely necessary up to that period, and after that was ascertained I asked Mr. Powers if he was perfectly satisfied with everything that was going
92 on and he said: "I think the boys are doing the best they can and when they do that, that is all I can ask."

FRANK POWERS having been recalled by plaintiff for further cross-examination under the statute testified:

I have owned the Worlds Fair mines since 1891. I have superintended the workings of it since that time. I know the ore very well in the mines; I have personally taken innumerable samples of it and have gone all over it to see where the ore was and the quality. I saw all the workings of the mine. I have taken out large quantities of the ore and shipped; sold it and got returns from it. I have made thorough tests of the value of the ore I have shipped. I have been a mining man since 1875. I have followed mining all the time since.

Q. Mr. Powers, didn't Mr. Stewart ask you this question, when he was on a visit down there at the mine sometime about April, 1904? Didn't he ask you this question there at the mine: "What do you deem a fair valuation of the ore, in sight or the value of the property above the main level?" And didn't you answer: "It has been estimated between five and seven hundred thousand, the value above, but I don't think that is enough; I think it is worth more than that." Didn't you further say: "This is not a prospect; this is a mine, and in my opinion it is worth millions of dollars, and you and I may not live to see it worked out?"

93 A. I might have said so; yes.

Continuing D. A. STEWART testified:

He (Mr. Powers) said the Worlds Fair mine had been estimated as between five and seven hundred thousand dollars above in value, but, he says: "I don't think that is enough; I think it is worth more than that;" and he said after that, sometime: "This is not a prospect, this is a mine, and in my opinion is worth millions of dollars and you and I will never live to see it all worked out." About the 26th or 27th of April I told Mr. Powers that I would go home with my report of the conditions of the mine as to the progress of the work, feeling very much satisfied and very confident in regard to the mine, and the way it was worked, and the values and the ores they were then taking out, and I told him I would make an attempt as soon as I got home, I thought there would be no difficulty to do, to raise, to pay into the treasury, anywhere from twenty-five to fifty thousand dollars as soon as possible, and also to make the further effort to finance the mining properties to the extent of paying Mr. Powers his full amount and working the mine on a larger scale. The full amount of the account was four hundred and fifty thousand dollars.

Q. After the conversation and after you left Arizona I will ask you to state without saying whom you talked with, or anything of the kind, unless they bring it out by cross-examination, as to what you did along the lines towards financing these prop-
94 erties in the ways you suggested.

Mr. IVES: Wait a minute. I object to that on the ground that it is immaterial and self-serving.

Argument by counsel.

The COURT: I do not think it is material. The objection will be sustained.

Mr. HEREFORD: Now I will ask that my avowal go in there. I avow that I expect to prove by this witness that he went back to Winona and there made all arrangements for the purpose of raising between twenty-five and fifty thousand dollars; that at the same time he made arrangements to bring out to these mines certain people to agree that they would pay the four hundred and fifty thousand dollars that had to be paid under that contract, if the report of Mr. Rawson, whom we have referred to in the evidence, was sustained by the showing of the mine, and if the bullion returns, copies of which Dr. Ferguson was handed by Mr. Powers, and which have since been put in here for identification, were true reports, and that that fund was secured at that time and ready to be paid into the mine. We will show that at the time the suit by Powers and his wife against The Worlds Fair Mining Company was started, these matters were so far under way that they would have been consummated within a few weeks if they had not been stopped absolutely by the bringing of the Powers' suit.

95 Q. Doctor, do you know the value of the contract that The Worlds Fair Mining Company had with Mr. Powers?

A. I do.

Q. What was the value?

Objection.

Objection sustained.

Cross-examination by Mr. IVES:

There was two thousand dollars sent to Dr. Ferguson to pay the running expenses of The Worlds Fair Company's operations there, and its debts after the suit of Mr. Powers was instituted and money garnished in the bank.

Testimony of Z. F. Rawson, a Witness for the Plaintiff, Read From Transcript in Former Trial of this Case as per Stipulation.

My name is Z. F. Rawson; I know Mr. Powers. I am one of the gentlemen who was originally associated in the mines with Dr. Ferguson. I have been interested in it in all its phases up to the present time and was a stockholder of the London-Glasgow and of the Worlds Fair Company. I first went up to the Worlds Fair mines in November, 1903, with Dr. Ferguson and Mr. Kington; previous to going up there I entered into an arrangement with Dr. Ferguson with regard to shares of stock, and when I went up there I was connected with him and interested in the contract. I examined the mine in a general way. There was a mill building on
the mines and a more or less complete concentrating plant
96 of about ten stamps. There was a ten stamp mill and I think two concentrating tables, an engine, boiler, and rock breaker inside of the mill, and there was a part of another old process that had been torn out laying outside of the mill. At the south of the tunnel was a boiler, steam boiler. There was a cottage at the mouth of the tunnel, perhaps 75 feet. Everything in plain sight. There was a good deal of ore along on the track between mouth of tunnel and mines, which completely obstructed the track. Had to climb over the ore in passing from mine to mill. The main level consisted of a tunnel. There was also a shaft and other workings in two or three different directions a short distance. I went into the tunnel on the main level to the point where afterwards the London-Glasgow Company and the Worlds Fair Mining Company went down with their workings. At the point when I went there first there was a windlass, also a shaft full of water. No other machinery there at that time. There was water running in the tunnel all the time to such an extent that I had to wade through it in getting in. I took charge of the work that was started under the contract about the 20th, and the 25th of November I went up with the intention of looking over the machinery and seeing what was needed. It was full of water and had to be pumped out, and I came down the next day and bought a new sinking pump and had
some repairs made on it. Had brass linings put in it and
97 brass plungers and took it back and commenced pumping the mine. This was about November 25th. My business is mining and milling and it has been something like 20 years. Have worked both as day laborer and held positions of trust and re-

sponsibility. I have been superintendent of three different mines previous to this, and have had full and complete charge of three different mills as mill foreman. About 500 feet in from the mouth of tunnel there is a small hoist, there I put in this sinking pump. It took me about 5 or 6 days to get down to the bottom of this winze, then I commenced to use his hoist he had to hoist the dirt and mud, because the tunnel below had caved in and I could only pump a certain amount and come up to the caved in point, then I would have to clean that out. Then I saw his hoist could not be adequate and I made arrangements for another hoist which I bought, and another small pump. Then I commenced to make my station the 150 foot for this new hoisting and in the meantime I was pumping and using his small hoist till I got mine in shape, after this I worked with mine. This station is something like 30 feet high at the highest point, and perhaps 25x30 more or less. I installed this machinery there. Directly below this is a shaft something near a 100 feet, what we called our first level, it is the second level of the mine. What we called the first level of the mine, this drift, was caved in, in a good many places. I had to clean it out and
98 retimber where it was caved in. This was about 100 feet below the level of the tunnel. I fixed this up for a distance of near 300 feet. The 300 feet was not all caved in, only in places, and soft mud and muck had run in. Besides the 300 feet described there were other workings. After I went to work I commenced to run the tunnel on further and run it in perhaps 220 some odd feet, which was in low grade ore, practically the whole distance. There was also high grade ore there. There was ore top and bottom; low grade ore for a distance of about 75 feet, on the other side of this was high grade ore, and from that on low grade ore. The entire length of the 100 foot level when I left it was perhaps 450 feet. From the shaft down 750 feet there is a long drift running another way and a short drift. Not much low grade ore in the short drift, but there is in the long drift. After I got this cleaned out I commenced on the incline down from this immediately below this perpendicular shaft. There was a winze started there and I commenced pumping that out and sinking on that. I started another level, I think at 50 feet in the same direction as the long level. There was practically the same vein of ore as in the 750 foot tunnel but better ore. I run this in 78 feet. It was a very small streak when I started. It commenced to open up at a point about 18 feet in, and opened up to 8 inches. It was from four to six feet wide at about 20 feet in, and still continued about three feet wide when I left there, at a point about 80 feet. This was high grade ore.
99 Think we had about 20 feet of ore at the widest. The vein would vary from 3 to 6 feet in width. The two carloads of ore afterwards shipped by The Worlds Fair Mining Company for which returns of seven thousand odd dollars were received, came from this ore. I also run in the opposite direction north of this same level, and struck some ore, but not as good ore as on the opposite side. I run in something like 60 or 70 feet. I also went down 40 or 44 feet deeper following a vein. I was in high grade

ore when I quit work. Had 14 inches of high grade ore in the bottom of the shaft. It was geting richer as I went down. The work was all done in a workmanlike manner. I put in timbers wherever it was needed, and kept the mine pumped out clean and dry. Mr. Powers was there most of the time, living there. He went in with me once a month and measured the amount of work done during the entire time. He accepted the work as far as my contract was concerned.

Mr. IVES: I move to strike that, the last sentence, out.

Motion granted.

The Witness continuing testified:

He held one end of the tape line and me the other while we were measuring the work. He spoke as though he was perfectly satisfied with my work. He never made any complaint in regard to the work that was being done. We were always ahead of
100 our contract calling for 50 feet a month. Wm. Brammer was the first foreman and remained about two months. August Yolick was next foreman and after him was Captain James Thomas. Mr. Brammer is now in Sonora somewhere, I think. Mr. Powers several times asked me why I didn't ship the ore lying there across the car track and clean up the yard, and get rid of it. I was in charge of the mines at the time the ore was shipped. Mr. Powers never made any complaint about the ore being shipped, and never objected. The ore that we opened up in the mines assayed from 20 ounces to 60 ounces in low grade ore and as high as 600 ounces in high grade ore per ton, and perhaps low grade ore from 40 to 50 dollars a ton, that is on the average. I drew the checks for the payment of money for work on these mines until about the 1st of May. I paid out during that time for work and machinery on the property about $20,000. Sometime in April, 1905, I had a conversation with Mr. Powers in which the subject of the breaking of the contract that Dr. Ferguson afterwards assigned to the London-Glasgow Company, and which was afterwards assigned to the Worlds Fair Company, was discussed. In that conversation Powers said: "If I could get some one to advise me to fight it, I would fight it and I would stop them working." And I made the remark, "on what ground?" and he says: "Because you are not entitled to this $12 a ton," and he says: "If I could find a lawyer to advise me to
101 fight it, I would do so." And I says: "I will advise you not to do so"; and I says: "If you did they would beat you and if they beat you, they will have grounds for damages." And he says: "If they beat me they will have grounds for damages?" And I says: "Yes, and they are not people that will overlook it and I advise you not to undertake it." Afterwards he came back, I think from Tucson, and said: "I have found a lawyer who advised me to fight it, and I am going to do it; I have got my lawyer that advises me to fight it." I don't remember whether he said "his lawyer" or "I have a lawyer." When I spoke about, "if you do it and the Company beat you, they will be able to come back with a damage suit against you" he said, "I don't care if they do; I am going to fight them anyhow." He says: "They may be entitled to it but I

am going to fight them." I was through all the workings of the Worlds Fair Mine above the main level once. I made such an examination of the workings of the mine below the main level as would enable me to give an opinion as a mining man as to their value below the main workings. I would estimate the value of the mine as shown by the workings below the main level, exclusive of the workings above the main level, at something like $200,000. I would estimate that, at the time the two carloads of high grade ore were shipped by the Worlds Fair Mining Company that we could have shipped one carload of high grade ore a day from the
102 workings of the mine below the main level. In the old workings of the mine there was plenty in sight; all in ore you might say. The mines are situated about twelve miles from the railroad. There is a good wagon road between the railroad and the mine. Patagonia is the name of the railroad station and it is about four miles from the mine in a direct line. It cost about $4.50 per ton to freight the ore and supplies between the railroad station and the mines. I estimate that from one to two car loads of ore a day could be taken from the lower workings of the mine and that it would cost less than $100 a day, including everything except shipping charges. The workings were all in ore. I was superintendent of the mines at that time. Mr. Thomas was next to me. He remained there in charge for the Company and I came away. Mr. Ferguson was over me. He was president and general manager.

Cross-examination by Mr. IVES:

We did about 65 feet of sinking on the mine during the time I was in charge. I was superintending the work practically all the time until Mr. Powers took possession, July 25th. As well as I can remember we did about 250 feet of drifting and tunneling on the main level, on the first level south and about 60 or 65 feet north. On the second level south 78 or 80 feet and about 40 feet north, we did about 65 feet sinking in ore and about 100 feet dead work.
103 That was done about 350 feet from the mouth of the tunnel. When I took the mine it was full of water and I had to work some place and would rather do dead work than not to do any work at all. I did about 580 feet of sinking and drifting. I first saw the mine in November, 1903. I first went through the mines with Dr. Ferguson and then came down and bought a pump from Roy & Titcomb; paid $290 for it F. O. B. here (Nogales). We paid about $11 freight to get the pump and some other supplies out to the mines. I bought a boiler and hoist at Camp Washington and paid $525 for it and it cost about $100 to get it over to the mines. The pipe and remaining permanent improvements put in the mine, that is permanent machinery and improvements, cost perhaps $250. I let a contract to different parties for some drift or tunnel work or sinking in the mines. I paid $3.00 per foot for drifting and in places I paid $12 per foot for sinking. I did the dead work to protect our contract. The London-Glasgow Development Company does not owe me any money, nor did the Worlds Fair Company until after the attachment. I could not tell the value of the ores that could be taken

out of the mines until I examined the ores. I am not an expert mining man. I think I would be capable of figuring out the number of tons between two drifts if I got the size of the vein and if I got the assay value of it I could figure out the value of it. I have figured out the tonnage of pay ore below the main level in these mines
104 at something over 5,200 tons, including both high grade and low grade one, which would average in my opinion perhaps $250 a ton. I have no recollection of telling Chris Wilson that the mines were not worth over $100,000.

Did you at any time prior to July 25th, 1904, entertain any opinion that the property was worth less than $300,000?

No, I did not.

I am interested in both these companies and invested my good, hard earnings in them. My profit in the enterprise would have resulted from the mines being of greater value than the rate of $450,000 for three-fourths of them, and I figured that there was more than that in sight. I am familiar with the portion of the contract relating to the $12 a ton for treatment and believed that the companies and Ferguson were entitled to the $12 a ton. I believe the ore on the dump was better adapted to shipping than to be treated at the mine.

Testimony of John W. Booth, a Witness for the Plaintiff, Read from the Transcript in Former Trial of This Case, as per Stipulation.

I reside at Winona, Minnesota. I am engaged in banking and have been during my business life. I am in the neighborhood of fifty years of age. Am cashier of the First National Bank of Winona, Minnesota, and a member of what is known as the Winona Syndicate. I first visited the Worlds Fair Mine about the 13th of March, 1904, for the purpose of inspecting the property and reporting to
105 the Syndicate my judgment as to its merits. They were shipping the dump ore at that time. Mr. Powers was there. I was out at the time four or five days at least. Mr. Powers made no complaint to me at any time. I took many samples of ore from the mine and had them assayed. I met Mr. Powers in Tucson on the 17th day of March, I think that was the date, and we talked over the Winona Syndicate and I told him who they were.

Cross-examination by Mr. Ives:

I was at the office of E. S. Ives, in the City of Tucson, on the 14th of April. Mr. and Mrs. Powers, Dr. Ray Ferguson, Dr. Stewart and myself and Mr. Ives were present. There was a general conversation between Mr. Powers and others and myself with respect to the $12 per ton in the contract.

Ray Ferguson, called as a witness on behalf of plaintiff, testified as follows:

My name is Ray Ferguson. I am a physician and am Superintendent of the Territorial Asylum for the insane. I am the same Dr. Ferguson that has been mentioned in the proceedings here in

relation to the contract and who originally took the contract with Mr. Powers. We began work at the mine under the contract in the latter part of November, 1903, and from that time until the institution of the suit by Mr. Powers in this case the provisions of the contract were all complied with by us. I paid out the money
106 for the expenditures and work upon the mine after May 1st, when Mr. Rawson quit. The tenth was usually our pay day. About that time I paid out five thousand and odd dollars for supplies and work and on June 11th, I think the date was, I paid out in excess of $1400. Subsequent to that time and extending over a portion of June and July, I paid in excess of two thousand dollars and after that I paid out at least $500. There was other work and supplies done for which the Company was responsible, aggregating about $4848, for which judgments have been obtained. These judgments were for work and supplies furnished to and done upon the mines itself under this contract. All this was in addition to the twenty thousand dollars testified to as having been expended by Rawson. When I first saw the mine the ore value in the vein was only a few inches. The rest was low grade and waste. The ore value widened from a few inches to six or eight or ten inches in width and finally in places to two feet in width. I mean the high grade ore. It was this same ore that we shipped and got these large returns from; the two carloads. The last time that I was at the mine before Mr. Powers took possession in July was about the eleventh or twelfth of June on pay day. This high grade ore at that time was at least two or three feet wide, as I remember. The Worlds Fair Mining Company received its money for carrying on its work, with the exception of the money received from the shipments of ore, from the Winona Syndicate. The value of
107 our contract was depreciated by Mr. Powers taking possession of the mines.

Q. Now, Doctor, after the suit was brought—hold on a minute, before I come to that—Doctor, at the time the other suit was brought and the money was garnished and attached——

Mr. IVES: I object. That is assuming something that is not true.

The COURT: I think your action is upon the attachment and injunction bonds. The objection will be sustained.

Mr. HEREFORD: I want to make an avowal. I avow that I offer and expect to prove by this witness that the Company was afraid to have their money and resources brought into this Territory for fear it would be attached and garnished and then it would accomplish no good purpose and would not be able to pay it out, and for that reason they did not dare to bring any resources into the Territory.

Objection by Mr. Ives.

Objection sustained.

The WITNESS (continuing) testified:

The property was first worked under the contract by the London-Glasgow Development Company. I was president of that Company. After the London-Glasgow Company the Worlds Fair Company

took it. I believe at one time, and possibly for a considerable length of time, I was president and I know I was General Manager and acting Treasurer of the Worlds Fair Company. I
108 visited the mines under the contract at short intervals. I was usually there several times a month, possibly as ofter as three or four times a month. I gave instructions to the Kansas City Smelting and Refining Company, at El Paso, to whom we shipped our ore, that at the time a statement of ore values and charges in the way of returns were sent to the Worlds Fair Mining Company a duplicate was to be sent to Mr. Ives for the use as attorney and for the use of Mr. Frank Powers.

Cross-examination by Mr. IVES:

Q. Doctor, do you remember how many shipments of ore from these mine were made by the London-Glasgow Development Company to the Smelting Works?

Objection by Mr. Hereford.

Argument by counsel.

The COURT: The objection is overruled.

Mr. HEREFORD: My objection and exception goes through all this line of testimony.

Mr. IVES: That is understood.

The WITNESS:

A. My recollection is about thirteen cars. This was shipped from the dumps. The Worlds Fair Mining Company shipped two car loads. The London-Glasgow Company probably shipped sixteen car loads from March until May. Thirteen cars of it was ore laying along side of the car track and the mill.

109 Q. Doctor, will you state, after refreshing your memory, whether the Kansas City Smelting and Refining Company made a return about March 14th, 1904, of about 40 tons of ore shipped by the London-Glasgow Development Company from the World's Fair Mine.

Objection by Mr. Hereford.

Objection overruled.

Mr. HEREFORD: I object to all this line of testimony.

The WITNESS (continuing) testified:

The net returns, as I understand their figures, for that shipment of ore was $1,128.61. On or about March 24th, 1904, the Consolidated Kansas City Smelting and Refining Company made a return to the London-Glasgow Development Company for thirty-eight tons and seven hundred and seventy-five one hundredths tons, the net proceeds being $1,883.37, and on March 24th the Consolidated Kansas City Smelting and Refining Company made a return to London-Glasgow Company for twenty-eight tons of ore, the amount of net return being $1,521.86. On April 8th the Consolidated Kansas City Smelting and Refining Company made a return on forty-one tons of ore, showing a balance due to the London-Glasgow Development Company of $1,096.82. All of which amounts were received by the

London-Glasgow Development Company; they paying the railroad freight charges. Out of this the London-Glasgow Development paid freight charges from the mine to the railroad station of $4.50 a ton and the sacking and loading into the wagons and loading into the cars at Patagonia, amounting to about one dollar a ton. The only deposit made by the London-Glasgow Development Company, to the credit of Frank and Joesphine Powers at the Arizona National Bank, to my recollection, was one of two hundred and four and some cents or two hundred and six and some cents; that was the only deposit made to my knowledge. The Worlds Fair Mining Company made no deposit with the Arizona National Bank to the credit of Frank and Joesphine Powers to my knowledge. The Worlds Fair Mining Company received the proceeds from two car loads of ore, which have been testified to, amounting to seventy-six hundred dollars and something.

It is admitted that Ray Ferguson assigned this contract (being plaintiff's Exhibit "A") to the London-Glasgow Development Company on the 9th day of April, 1904, together with all rights to the machinery and everything involved and that the London-Glasgow Development Company assigned the contract and all property involved to the Worlds Fair Mining Company on or about the 15th day of April, 1904.

Cross-examination by Mr. IVES:

I do not remember just when the deposit of $206 in the Arizona National Bank to the credit of Frank and Josephine Powers was made. It is probable that I received a letter from Mr. Ives, dated May 4th, 1904, in which he called my attention to the fact that no deposit had been made from the ores shipped by the London-Glasgow Development Company. I do not know whether the $206 was deposited before I received the letter or after. I also received a letter, dated March 31st, 1904, from Mr. Ives inquiring concerning proceeds of the ores shipped by the London-Glasgow Company. I have no way of knowing from what source we received the $391.86 deposited to the credit of the London-Glasgow Development Company on April 4th, 1904, nor the deposit of $3,559.29 on March 28th. Our money was received from two sources, one from ores shipped to the Kansas City Smelting Company and the other was the Winona Syndicate, and at one time some advances were made by Mr. Rawson from his own personal funds. About the time and just before suit was brought against the Worlds Fair Mining Company, I received a check for $311 from the Kansas City Smelting and Refining Company, being a balance due on ore shipped by the London-Glasgow Development Company, and which had not been remitted by the Company through error. After the suit was brought by Mr. and Mrs. Powers, I received two thousand dollars directly for the purpose of paying laborers who had no money. I can't say to whose credit the $311 was placed, but my recollection is that I contended that it was due the London-Glasgow Development Company and it must have been sent to the credit of the London-Glasgow Development Company.

I remember the conversation that led up to the fifteen day clause in the escrow agreement. There was quite a lengthy talk before the escrow agreement was drawn. All the assets of the London-Glasgow Development Company were assigned to the Worlds Fair Mining Company and as far as I know the Worlds Fair Mining Company assumed all its liabilities.

Redirect examination by Mr. HEREFORD:

The first car load of ore shipped by the London-Glasgow Development Company was 40.18 tons and we received for that $1,128.61; the second was 30.52 tons and we received $242.05; the next was 40.58 tons and we received $23.50; the next was 43.9 tons and we received $18.40; the next was 41.5 tons and we received $242.88; the next was 27.9 tons and we received $1,521.86; the next was 38.7 tons and we received $1883.37; the next was 43.2 tons and we received $469.40; the next was 40 tons and we received $391.86; the next was 28.2 tons and we received $274.90; the next was 31.2 tons and we received $483.26; the next was 40.5 tons and we received $1,096.82; the next was 29 tons and we received $216.64. This was all shipped from one group of ore and was shipped from the dump.

113 Recross-examination by Mr. IVES:

In addition to the thirteen carloads of ore testified to as being shipped by the London-Glasgow Development Company there were three other carloads shipped by the Company. I do not remember what these shipments were or the tonnage or the amount received. I do not remember whether the judgments for $4838 were amounts due for labor employed by the London-Glasgow Development Company or the Worlds Fair Mining Company. The substantial part of the money was for labor owing from the Worlds Fair Mining Company. These judgments have never been paid with the exception of one man that entered into the suit with the others and who worked at the mine subsequent to the time of the failure to pay, and I remember two of the men having judgments that I afterwards paid in cash wages that were due them. They still have judgments for probably two hundred dollars. The balance of the judgments were for supplies to the Worlds Fair Mining Company. These have not been paid. The sum of $234.39 deposited in the Arizona National Bank on April 28th, 1904, to the credit of Frank and Josephine Powers was the only amount ever deposited by either of the companies in the Arizona National Bank to the credit of Frank and Josephine Powers, or either of them, on this contract from ores shipped.

FRANK POWERS, called on behalf of plaintiff for further cross-examination, testified as follows:

By Mr. HEREFORD:

114 The notices posted by me on the mines in July, 1904, at the time I took possession of the mines, and signed by myself

and Mrs. Powers was signed by me with her consent. I was acting for her as well as myself when I took possession of the mine some time about March 28th, 1905, or a little later. I received a letter from Mr. J. W. Booth, one of the Winona Syndicate. I cannot produce it now. It is lost or destroyed so far as I know.

Plaintiff produced in evidence, without objection being offered, a copy of the letter referred to, being dated March 25th, 1905, and signed by J. W. Booth, which was admitted and marked Plaintiff's Exhibit "C."

I refused the permission he asked. I didn't want to have anything more to do with them.

Q. You were in the court room during the trial of the first case, were you not? The one of Powers against the Worlds Fair Mining Company at Nogales?

A. Yes, sir, I was.

Q. At that time did I not, on behalf of the Worlds Fair Mining Company, make a demand on you for the possession of the property? In other words, didn't I say this: "We demand possession of you right now;" referring to the property?

A. I don't remember the question. I remember——

Mr. HEREFORD: I read now from the Reporter's Tran-
115 script from the first trial of the case of Powers against the Worlds Fair Mining Company. We were endeavoring to make a stipulation, and the latter part of it was this: "And that paintiff has ever since refused plaintiff's agents"——. Then I said "We demand possession of you right now."

Mr. IVES: I object on the ground that there was no proof that Mr. Hereford was representing this Company.

Cross-examination by Mr. IVES:

Mr. Booth's letter was referred to my attorney, Mr. Ives, for reply. I authorized Mr. Ives to make reply for me in the matter and he acted for me in the matter, I instructed him to look after my business with the Worlds Fair Company.

Mr. Ives reads letters from himself to Mr. J. W. Booth and Mr. J. W. Booth's replies to the same bearing dates respectively: April 5, 13, 19, 24 and 26, and May 12, 1905.

RAY FERGUSON was examined for defendants and testified as follows:

By Mr. IVES:

On June 11th, there was on deposit to the credit of the Worlds Fair Mining Company in the First National Bank of Nogales the sum of seventy-three hundred and odd dollars. I made a deposit there on the 6th of June. I don't remember making any deposits between the 6th and 11th of June.

By Mr. HEREFORD:

116 When I signed the escrow agreement with Mr. Powers I was acting for The Worlds Fair Mining Company.

Mr. HEREFORD: I believe you agreed to stipulate that the deeds contemplated by the contract were deposited with your escrow agreement with the Arizona National Bank on or about April 18th, 1905?

Mr. IVES: I object to that as immaterial, but I admit that Mr. Jacobs would swear to that.

The COURT: The objection is overruled.

FRANK H. HEREFORD, as a witness called on behalf of plaintiff, testified as follows:

At the time of the trial of the first case of Frank Powers against the Worlds Fair Mining Company, the case in Nogales, Arizona, the question of whether or not we had demanded possession of the mine coming up, I then and there, in open Court, demanded possession of Mr. Powers and his wife of the mines and the property. As near as I can recollect, I said: "I demand possession of the property now." I further stated that I had been authorized by Dr. Ferguson. I do not mean to say that is the only authorization I had. I had authority to get possession of the mine and let them go ahead with the contract. I did not accompany that demand by any offer to pay any portion of the proceeds of that ore to Frank and Josephine Powers.

Mr. HEREFORD: Now, if your Honor please, I would like to make the offer of Dr. Stewart's testimony as to the value. I have some authorities here directly in point.

117 The COURT: I think I will permit the evidence to be read upon the authorities submitted.

Mr. HEREFORD: I have read what preceded this in the testimony of Dr. Stewart, so I will only read this question and answer (Reads from Transcript).

Q. Doctor, do you know the value of the contract that the Worlds Fair Mining Company had with Mr. Powers.

A. I do.

Q. What was that value?

A. About $200,000.

Mr. HEREFORD: Now, I want to offer first the pleadings, that is the Complaint amended and the Answer and the Judgment in the case of Frank Powers against the Worlds Fair Mining Company. I concede that it may be in rebuttal, but still I thought I would offer it at the present time for the purpose of showing that the suit which was instituted by Frank Powers against the Worlds Fair Mining Company has been decided absolutely in favor of the Worlds Fair Mining Company and against Frank and Josephine Powers.

Objection by Mr. Ives.

Argument by counsel.

The COURT: I shall sustain the objection to the evidence offered. This refers to the pleadings you offered, Mr. Hereford.

Mr. HEREFORD: Then to save the record I make the same avowal that I made before.

Objection by Mr. Ives.

118 Objection sustained.

The plaintiff rests its case.

Mr. IVES: If your Honor please, we ask the Court to direct a verdict.

Whereupon the Court instructed the jury as follows:

Instructions of the Court.

GENTLEMEN OF THE JURY: There has been a motion made that the Court direct a verdict for the defendant, and under the view the Court takes of the law and the pleadings in this case, I feel compelled to comply with the request and grant the motion. Therefore, I direct, as a matter of law under the pleadings in this case, that the plaintiff has not proven its case, and, therefore, direct you to return a verdict for the defendants. Mr. Barkley (a juror) you may come around and sign this verdict as foreman of the jury.

S. Y. Barkley signs the verdict as foreman of the jury under the instruction of the Court.

The COURT: Let judgment be entered on the verdict.

Plaintiff's Exhibits.

Plaintiff's Exhibits "A" and "B" are copies of plaintiff's exhibits "A" and "B" respectively attached to and made a part of its amended complaint.

119 PLAINTIFF'S EXHIBIT "C."

MARCH 28, 1905.

Mr. Frank Powers, Patagonia, Arizona.

DEAR SIR: I have just returned from a short trip to Arizona, during which time I intended to have seen you personally, but owing to the rainy weather, rail road wrecks, etc., I found it utterly impossible to get over to your place during the brief time I had at my disposal.

Last year about the time the litigation was commenced against the World's Fair Mining Co. we had the proposition before some Eastern capitalists with the idea of financing it and taking over the property on terms specified in your contract with Dr. Ferguson. The genetleman we were negotiating with was a resident of Chicago, and his associates eastern people. He was about to start on a trip to Europe at that time and said to us he would not take the matter up until he returned. Since the first of the present year he has been considering the matter with his eastern associates, and if the statements regarding the property which we have in hand can be verified, these people are willing to take the property and pay the price agreed upon. If this can be brought about it seems to me it is better for all of us than to have our matters in litigation for a long period of time, that seems unavoidable unless a settlement of this
120 kind can be brought about. I appreciate as much now as I did last season when I was there, that the World's Fair is a remarkable property, and if it is handled so as to save all the values

of the low grade ore, together with the rich deposits that have been found, and probably will be in the future at numerable points, great results can undoubtedly be obtained. However to solve the problem of the low grade ore means the very best of judgment and a company big enough to meet all the requirements. It would seem to me if a syndicate would at this time take over this property, pay you the $450,000.00, and give you a one quarter interest in the mine, it is as good a proposition as you can hope to make, and it seems to me it would be a desirable outcome of the unfortunate complications that exist at present. I wish to say if these parties can have an opportunity to look over the property, can have an opportunity to send an average sample of the ore taken from the different parts of the mine to the president of the School of Mines, Columbia College, New York, for analysis, they are willing to go down to Ariz. and go over the proposition. They are big people and can carry out any proposition that appeals to them without delay.

I wish you would go over the matter with Mrs. Powers and let me hear from you regarding it. I enclose a stamped envelope for a reply.

Yours very truly,
(Signed) J. W. BOOTH.

121 MARCH 28, 1905.

Mr. Ives, Attorney, Tucson, Arizona.

DEAR SIR: I enclose copy of letter sent by this mail to Mr. Frank Powers, hoping I may have a reply to same, and thinking he may take the matter up with you I would like to have my letter brought to your attention.

I might say in this connection that these people are men of very large means, and are amply able to consummate the proposition if they regard the property desirable to take over. I know they will be glad to take a trip to Ariz., and investigate it, and I trust Mr. Powers and you as his attorney may look on the proposition with favor.

I shall be glad to hear from you regarding the matter one way or the other.

Yours very truly,

J. W. BOOTH.

PLAINTIFF'S EXHIBIT "D."

APRIL 7, 1905.

Mr. Eugene S. Ives, Tucson, Arizona.

DEAR SIR: I thank you for your letter of the 1st inst. I regret that our matters are not in such shape that we can comply with your request at this time regarding the litigation that will probably come before the Court on the week of April 10th.

122 I do not understand on what grounds Mr. and Mrs. Powers can charge any bad faith or failure to comply with the provision of the contract under which the Worlds Fair Company were acting. Every dollar of revenue received from the shipment of ore,

together with between twenty thousand and thirty thousand dollars advanced by the individuals comprising the Worlds Fair Company was put into the development work of the mine; the Co. were endeavoring to carry out in good faith the contract entered into, and if litigation had not commenced the proposition would have been financed, Mr. and Mrs. Powers paid the consideration named and the property taken over, but as stated in your letter it is useless to indulge in crimination or recrimination. The only thing is, will it not be better for Mr. and Mrs. Powers to consent to the carrying out of this contract rather than continue along an expensive litigation the outcome of which must necessarily be uncertain. Is it not your judgment and would you not as their attorney advise such a settlement?

There is not a property in Ariz. which can reach its possibilities unless the value of the low grade ore is practically and economically utilized, and it must be evident to you that this can only be accomplished by a big Co. with ample means, and scientific and up to date methods. For Mr. and Mrs. Powers to have paid over to them $450,000.00 and retain a quarter interest of the stock in one of the big mining companies of the country, would give them in my judgment more money many times over than they can ever
123 possibly get out of the mine by working it themselves. We know he has handled some very rich ore opened up in the section we developed, and which will be very strong evidence on the value of our contract as the litigation develops.

I hope you may see your way clear to take this proposition up with your clients, let the gentlemen we have called to your attention go down to Ariz., and verify the statements we have made them, which we are sure can be done and thereby reach a settlement that certainly must be desirable for all parties concerned.

Yours very truly,

J. W. BOOTH.

PLAINTIFF'S EXHIBIT "E".

APRIL 19, 1905.

Mr. Eugene S. Ives, Tucson, Arizona.

DEAR SIR: I am pleased to acknowledge your favor of the 13th inst. and we appreciate the consideration you have given to the substance of my recent letter.

It is becoming evident our unfortunate legal troubles are the results of an entire misapprehension on the part of Mr. Powers, and if all parties will be sensible the time has come when our affairs can be satisfactorily adjusted. In one case efforts have been made to appropriate the benefits of seven months' work and ex-
124 penditures on the property, and in the other to appropriate a few thousand dollars escrow funds, and now having arrangements perfected with parties of large business experience and ample means to carry out any arrangements they may undertake, who are willing to send their representatives and experts to Ariz. for the purpose of making a full and complete examination of the

property, and who stand ready to take it over if their examination verifies the statements we have made. It will be the height of folly not to avail ourselves of it. I am certain the results of their examination will mean the taking over of our contract, the payment of $450,000.00 to Mr. and Mrs. Powers, and giving them a quarter interest in what will be in the near future one of the big mining companies. There need be very little delay in bringing this about and no doubt the legal situation in the meantime can rest as it is without prejudice to either side. I am sure you will permit me to say my associates are honorable business men, and when amicable relations are reached they will be as ready and anxious to deal fairly and equitably with Mr. and Mrs. Powers as they can wish us to do. The necessary thing now for a consummation of this arrangement is an assurance from you that the representatives of these Eastern parties can have access to the mine for the purpose only of making the examination, and we will arrange for them to act with as little delay as possible. I think you will be pleased to know the
125 representatives of these people and through them their Eastern associates, and I trust you may make the arrangements requested and advise us without delay.

Kindly let me hear from you not later than next week as arrangements are all perfected for these people to act as soon as they can get their representatives and experts together.

You may feel sure, Mr. Ives, we will appreciate your co-operation in perfecting the arrangements requested and that this effort is being made in good faith for the best interest of all parties.

Yours very truly,

J. W. BOOTH.

PLAINTIFF'S EXHIBIT "F".

MAY 12, 1905.

Mr. Eugene S. Ives, Tucson, Arizona.

DEAR SIR: Your letters of the 24th and 26th and telegram of the 26th ult. have been received.

It seems to me extremely unfortunate that the permission given in your letter of April 24th should be withdrawn, and I still believe if Mr. and Mrs. Powers fully understand that these parties who are willing to go to Ariz. with their experts and make an examination of the mine within the shortest reasonable time are no more interested in our part of the proposition than in theirs. They mu t regard such a move more desirable than a long and expensive
126 litigation. As long as our interests are in litigation it seems as reasonable to me for us to ask Mr. Powers to surrender the property to us as that they should ask us to pay the $3,000.00 mentioned in your letter. The only purpose of our recent efforts has been that Mr. and Mrs. Powers could get not only the amount you mention, but every dollar they are entitled to under the contract entered into with the Worlds Fair Company, in which corporation the Winona people are interested. If you and your clients could show that their interest would be jeopardized by the examination

requested, I can see why you would hesitate or even absolutely decline to permit it, but if considered in its true light, I fail to understand how any people can so disregard their own interest as refusing to consent to such a move. I assume you will credit my satement when I tell you that these gentlemen are able to take this property over and pay for it if their examination is satisfactory; that they are no more interested in our part of the proposition than they are in Mr. Powers, and that if this is consummated we can only hope in a small way to be reimbursed for the absolute money we have put into the proposition and to end a long and uncertain litigation which we must pursue to the last resort to protect our interests, unless like sensible people we reach a settlement between ourselves. I am also sure you will credit my statment and believe me that it is in no spirit of contention or bravado when I
127 say that the Winona people will consider no proposition for the payment of money as long as this matter is in litigation; you will also understand we cannot keep these parties interested in this proposition for any great length of time. As we wrote you heretofore, if we can be assured they can have access to the mine for the purpose only of making an examination not requiring more than thirty days at the furth*erest*, and probably not more than fifteen, they will go down to Ariz. as soon as they can get their experts together, say within thirty days.

I shall still hope in view of my stating to you frankly our purpose is only to avoid litigation and be reimbursed in a small way for our expenditures that you will try to induce your clients to permit the parties to make the examination and notify us at once as it cannot be much longer delayed. If this cannot be done, we, of course, must drop it, but I shall still hope to hear from you favorably, and with as little delay as possible.

Yours very truly,

J. W. BOOTH.

DEFENDANT'S EXHIBITS.

I.

This Exhibit is the pass-book of the London-Glasgow Development Company showing the accounts of the Company, checks, and deposits with the First National Bank of Nogales, from February 10, 1904, to May 21, 1904.

128 II.

TUCSON, ARIZONA, *April* 1, 1905.

J. W. Booth, Esq., c/o First National Bank of Winona, Winona, Minn.

DEAR SIR: I beg to acknowledge receipt of your letter. You must appreciate that Mr. and Mrs. Powers are considerably out of pocket by reason of their negotiations with the Worlds Fair Co. of which you are one of the principal parties. Without any disposition to indulge in crimination or recrimination, I think that if it be your

desire to resume negotiations with Mr. Powers, you had better first wire Mr. Hereford to consent to judgment in our favor for the full amount in the garnishment and notify the First National Bank of Nogales so that that amount which is plainly due to Mr. Powers may be received by him without further expense or delay. It seems to me that such action on your part would clear the way to a feeling which would result perhaps beneficially to all parties concerned.

Court meets in Nogales on the 10th of April, and I would suggest that whatever action you take may be taken before that date.

Yours very truly,

EUGENE S. IVES.

129

III.

TUCSON, ARIZONA, *April* 13, 1905.

Mr. J. W. Booth, Winona, Minn.

DEAR SIR: I beg to acknowledge receipt of yours of the 7th inst. I see nothing to object to in your suggestion that the people to whom you have in the East should come here and look at the Worlds Fair property. I am entirely satisfied that Mr. and Mrs. Powers will permit them to examine it, and that the old deal can be taken up after everything is satisfactorily arranged.

The law suit that I instituted did not strike at the life of the contract. It was merely with respect to the proceeds of the ore shipped. It seems to me that there should be no difficulty in effecting a settlement.

You will admit all of our claim except $800.00, and the only question at issue is whether or not our action was prematurely brought and our garnishment good. There are some $6500.00 of judgments against your company, and if our garnishment should be held effective these judgments would consume the amount in the bank, and Powers would be as far as I can see without recourse.

I think that in ordinary fairness you ought to pay him and to pay the laborers who have been bound to obtain judgments against your company. It is hardly reasonable to expect Mr. and Mrs.

130 Powers to entertain seriously a proposition involving the payment of $450,000.00 by parties who either cannot or will not pay the several thousand dollars due their laborers.

I am certain you will take this letter in the spirit in which I write it, and appreciate the force of what I say. Personally I would like very much to see the matter adjusted.

Yours very truly,

EUGENE S. IVES.

IV.

TUCSON, ARIZONA, *April* 24, 1905.

J. W. Booth, Esq., First National Bank, Winona, Minn.

DEAR SIR: I beg to acknowledge receipt of yours of the 19th inst. Your request therein and assurance from me that the representatives of certain eastern parties "can have access to the mine for the purpose only of making the examination."

Referring to a previous paragraph in which you state that such parties shall make a full and complete examination of the property, and that they will be ready to take the property if their examinations verify the statements which you and your associates have made to them about the property.

I am pleased to state that Mr. and Mrs. Powers will accord such parties all facilities to make a full and complete examination
131 of the property, it being understood, however, as you say, that this is the only purpose of their being permitted access to the property, and that you do not ask and that Mr. and Mrs. Powers do not consent to waive anything whatever by such permission.

If the sale of the property should be consummated it would be a happy solution of the situation.

I am sending a copy of your letter, and of this answer to Mr. and Mrs. Powers, advising them to approve and ratify this permission. If they should disapprove it I will wire you at once and my wire will reach you before you receive this letter. So if you do not hear from me, you may accept this letter as a fully authorized permission from them, that your parties have access to the property for the examination as stated.

Yours respectfully,

EUGENE S. IVES.

Telegram.

Received at Winona, Minn.

29 Z Co. F. 11 Paid.

TUCSON, ARIZONA, *April* 26.

J. W. Booth, First National Bank.

Permission accorded in my letter mailed Monday is withdrawn. Will write.

E. S. IVES..

132

V.

APRIL 26, 1905.

Mr. James W. Booth, First National Bank, Winona, Minn.

DEAR SIR: Since writing you last Monday I have seen the decision of the judge in the case which was tried at Nogales. He finds that the London-Glasgow Co. owed Mr. and Mrs. Powers for ore shipped, a considerable amount of money. As a matter of fact I offered in evidence in that case four smelter returns which showed after allowing you $12.00 per ton in dispute, a balance due the Powers of over $3,000.00. These were four of many shipments. The London-Glasgow Co. deposited only $204.00 to the credit of Mr. and Mrs. Powers. This demonstrates a clear cut, absolutely inexcusable conversion by the London-Glasgow Co. of the money of Mr. and Mrs. Powers.

While that Company is a Corporation, and perhaps neither of you gentlemen as its stockholders, or the Worlds Fair Co. as its assignee are responsible legally for its debts, still morally you are certainly

responsible. I have therefore upon mature reflection advised Mr. Powers to have no dealings whatever with you unless as honorable men you pay this amount which you yourself must admit to be due. If you will make these payments Mr. and Mrs. Powers will permit your representatives and their experts to examine the mine; it being understood, however, that such permission is in no sense a re-
133 vival of the old contract, or any waiver on their part, or is coupled with any option or contract of any kind or character, expressed or implied; and that Mr. and Mrs. Powers will reserve the right to revoke the permission to examine when in their judgment sufficient time has elapsed for such examination to be made; they to be the sole judges of the sufficiency of such time. I think you will appreciate the justness of this position. In a word Mr. Powers refuses to have any transaction with any of you gentlemen unless you return to him his money—the proceeds of his ore—which you received, and whether as individuals, or as managers of a corporation had the control of, and kept away from him to whom it honestly belonged.

If you have parties who in good faith wish to purchase Mr. Powers' mine you can have no objection to paying this just debt. Dr. Ferguson swore upon the witness stand that both Mr. Stewart and yourself were men of large wealth, and under the circumstances it seems to me that you should not hesitate to refund to Mr. Powers this money for which you are morally, if not legally responsible.

Awaiting a reply, I am,

Yours truly,

EUGENE S. IVES.

134 And on to-wit: the twelfth day of January, 1909, being one of the regular juridical days of the January term of said court, 1909, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

At this day, on motion of Mr. F. E. Curley for appellant herein, it is ordered by the Court that oral argument be granted in this cause and the hearing set for January 27, 1909.

And on to-wit: the twenty-sixth day of January, 1909, being one of the regular juridical days of the January term of said court, 1909, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

This cause coming on at this time for hearing, now, on motion of Mr. E. S. Ives, attorney for appellees herein, attorney for appellent consenting, it is ordered that said cause be submitted on briefs.

135 And on to-wit: the twentieth day of March, 1909, there was filed in the clerk's office of said court in said entitled cause a certain Opinion in words and figures following, to-wit:

In the Supreme Court of the Territory of Arizona.

No. 1078.

THE WORLD'S FAIR MINING COMPANY, a Corporation, Appellant,
v.
FRANK POWERS and JOSEPHINE POWERS, Appellees.

Appeal from the District Court of Pima County.

Before Honorable John H. Campbell, Judge.

Messrs. Frank H. Hereford and Frank E. Curley for Appellants.
Messrs. Eugene S. Ives and Samuel L. Pattee for Appellees.

Opinion by Kent, C. J.

Frank and Josephine Powers, owners of a certain group of mines, entered into a contract with one Ferguson for their sale, under the terms of which Ferguson or his assigns were to make the payment therefor within a specified time, and in the mean time to have possession of the property and to operate the same. Ferguson
136 was to do a certain amount of work per day, to reduce the ores, and to deposit the net proceeds therefrom derived by him in a bank to the credit of the Powers to be applied on the purchase price. By an escrow agreement under which the deed for the property was deposited with a certain bank, it was provided by the parties that upon demand *thereto* by the Powers to the bank, the bank should ascertain whether Ferguson had deposited the net proceeds from the ores within fifteen days after their receipt by him from the smelter, and if such deposit was found not to be made, then the bank was to return the deed to the Powers. The World's Fair Mining Company subsequently succeeded to Ferguson's interest in the contract, went into possession, and operated the mines under the contract. On June 6th, 1904, the company received several thousand dollars proceeds from ores smelted, which, on June 11th, the Powers attached in an action brought by them on the ground that the company was intending to convert them to its own use contrary to the terms of the contract, and at the same time obtained a temporary injunction against the company restraining it from shipping other ores. The injunction was shortly after dissolved, but the attachment remained in force. On June 25th, 1904, the Powers dispossessed the company by forcibly taking the possession of the mines from it. The company thereupon brought this action for damages for the breach of the contract by the Powers.
137 The complaint set up the contract, a subsequent modification thereof, and the escrow agreement; the acquisition by the plaintiff of Ferguson's rights under the contract; the institution of the suit by the Powers, the attachment and injunction therein; alleging that such suit was wrongfully brought and for the purpose of preventing the company from obtaining the benefits of the con-

tract, and to harrass and annoy it; alleged that at the time the attachment was served the company owed the Powers nothing; that by issuing the attachment the company was made to fear that if it brought any other monies into the Territory for the purpose of carrying on its operations under the contract, such monies would also be attached; that the attachment and injunction injured the company's credit and crippled the company's business and impeded its efforts to work the mines. The complaint further alleged, "that when the plaintiff had finally succeeded in overcoming the conditions occasioned by the wrongful and unlawful acts of the defendants," and on July 25th, 1904, the Powers forcibly entered in possession of the mines and deprived the company of the possession thereof and the right to work them, thereby rendering the contract valueless to the company. The complaint then alleged the damages suffered and the amount thereof, and prayed judgment therefor.

138 The answer, while admitting the execution of the agreement, denied generally the allegations of the complaint; alleged that neither the plaintiff nor its predecessors in interest had complied with the conditions of the contract; alleged that the plaintiff and its predecessors in interest had retained and converted to their own use certain proceeds from the reduction and sale of the ore to which the defendants were entitled under the terms of the contract; alleged that the attachment and garnishment set forth in the complaint was necessary by reason of the intention of the plaintiff to use the funds and so to convert the proceeds of the ore due to the defendants to its own use, and further alleged improper and wasteful management of the mines by the plaintiff, and prayed judgment dismissing the complaint. The plaintiff for reply to the answer denied that at the time of the attachment it owed all of the money attached by he Powers and alleged that it was not its duty to make payment of such amount as it did owe on the date of said attachment, to-wit, the 11th day of June, 1905, but that it was not its duty to make such payment until the 20th day of June, 1904; that on the 11th of June the Powers instituted the suit referred to in the complaint and caused the money to be attached with the purpose and object of endeavoring to break the contract, and for the reason that the Powers thought that by instituting the action and causing the attachment and in-

139 junction to issue, through the injury to the company's credit, it would be unable to carry out its contract with the Powers. The reply further alleged "that finding that the plaintiff still endeavored to continue under the terms of their said contract the defendant Frank Powers, for himself and the other defendant, with force and arms entered upon the mines described in the amended complaint and took forcible possession thereof with the intent and object to wrongfully terminate said contract and to deprive plaintiff of the profits thereof."

Upon the trial, and at the close of the plaintiff's case, the Court directed a verdict for the defendants, and from the judgment entered thereon and the denial of a motion for a new trial, the plaintiff has appealed.

The only assignments of error which are properly before us upon the record pertain to the action of the trial Court in directing a verdict for the defendant- and in refusing to permit the plaintiff to introduce in evidence the record of the proceedings in the injunction and attachmet suit brought by the Powers against the company.

Pending the payment of the purchase price the contract allowed the company to go into possession and operate the mines. This it did. The contract further provided that the net proceeds received from the ores during such period should be deposited to the credit of the Powers. No time when such deposit should be made was
140 specified in the contract. By the escrow agreement the time was fixed at a time within fifteen days after their receipt by the company. By the 20th of June, 1904, therefore, under the evidence in the case, the company was required to make the deposit of the proceeds received by it on June 6th. The evidence showed that such deposit was not so made. Was this condition, to-wit, that the company should deposit the proceeds realized from the ore, a condition mutual and dependant or one which was independent of the company's right to possession? If the former, it was incumbent on the plaintiff to allege and prove performance thereof or failure and reasonable excuse for non-performance: if the latter, such allegation and proof was not necessary. Viewing the contract as a whole it seems plain that it was an entire, not a severable contract; that the undertakings on each side were mutual and dependent upon each other, and that the right of the company to remain in possession during the life of the contract was dependent upon its fulfilling its obligation to account for and turn over the proceeds derived by it from the reduction of the ores; and this being so, the company came within the rule of law that, in the absence of clear language to the contrary, promises which form the consideration, if doubtful, will be held to be concurrent or dependent and not independent, and that where covenants are mutually dependent one party cannot recover without averring and proving performance
141 on his part of the conditions to be by him performed, or without averring and proving impossibility of performance by reason of facts constituting an excuse.

Buchanan vs. Layne, 68 S. W. (Mo.) 952.
Dermott vs. Jones, 64 U. S. 220.
9 Cyc. 642, 643, and 719, and cases cited.

In the complaint in the case before us there is no allegation of the performance of the particular condition in question. There is no general allegation of performance on the part of the plaintiff of the conditions of the contract on its part to be performed, such as is permitted by our statute. There is no allegation either of non-performance or of excuse for non-performance; the complaint is silent as to any act of the company in compliance on its part with the terms of the contract further than the allegation that it was in possession of the mines and of certain ores in process of shipment therefrom. The allegations in the complaint with respect to the attachment suit nowhere state or suggest that thereby the company

was prevented from depositing the ore proceeds or from performing any obligation on its part to be performed under the contract. So in the plaintiff's reply even, though by the answer the failure of the company in this respect was directly averred, there is no direct allegation that the attachment proceedings prevented in any
142 manner the company from depositing the ore proceeds, except such as might be inferred from the allegation that the attachment covered all of the company's personal property in the Territory; and this inference that the property of the company in the Territory was the only property of the company is negatived by the allegation of the complaint that the attachment suit caused the company to fear similar proceedings against any other funds it might bring into the territory.

With the pleadings in this condition the plaintiff offered upon the trial to put in evidence the record of the attachment suit. The offer was refused by the Court. It is to be borne in mind that this is not an action for damages by reason of the attachment or injunction issued. If damages were sustained by the company by reason of that suit the remedy is upon the bonds therein given, and such remedy is not sought here. This is an action for breach of the contract by the Powers and it is not claimed and cannot be claimed that the attachment suit constituted such breach, for thereafter the company continued to work the mines and the detrimental effect, if any, upon the company of the institution of the attachment suit had been overcome by the company prior to the commencement of the action, as is shown by the complaint itself wherein it is alleged, "but that when plaintiff had finally succeeded in overcoming the conditions occasioned by the wrongful and unlawful acts
143 of defendants, and on or about the 25th day of July, 1904, the defendants unlawfully and wrongfully, and with force and arms, entered in and upon the possession of the said mines and mining claims." The pleading and proceedings in the attachment suit were not material therefore, except as they might serve as an excuse for the company for the non-payment of the ore proceeds but it is evident that the institution of such suit in itself was not a legal excuse for non-performance unless such suit and the resulting attachment did, as a matter of fact, prevent the payment. If it did so actually prevent the payment, the evidence was clearly material; if it did not so actually prevent it, the institution of the suit itself and the issuance of the attachment afforded no excuse, and the evidence offered was immaterial. The difficulty with respect to the admission of the evidence is that there is no allegation in the plaintiff's pleadings to support the contention that such suit did prevent performance and hence render the evidence admissible. That this was the difficulty the trial Court found, is shown by the extract from the record, following the offer, which we quote:

"The COURT: I think that is material if it is offered for the purpose of showing why you did not make payment of the amount due under the contract.

144 "Mr. HEREFORD: That is one of the reasons if the Court please.

"The COURT: If that is an excuse for non-performance—if you offer it for that purpose——

"Mr. HEREFORD: It is for that, among other purposes.

"The COURT: I think this, that if you are required to pay a certain sum of money under your contract on a certain day and in order to prevent you from doing that, they garnished and attached the money wrongfully, then I think you are entitled to show that fact as an excuse for not paying the money on that day.

"Mr. IVES: I object to it on the grounds as stated. We object to it on the grounds that it is immaterial; on the ground that it does not tend to show any breach in the contract by the defendants in this action, or either of them; on the ground that there is nothing in the complaint to show that the attachment was gotten out maliciously or without probable cause, or that the complaint does not sufficiently state that it was gotten out maliciously or without probable cause, and that the complaint does not sufficiently state a cause of action by reason of the getting out of the attachment without probable cause or maliciously, and upon the ground that it is not an action which is brought upon the bond given upon the issuing of the attachment or the injunction; and on the further ground
145 that the complaint not having that set up a performance of the contract by the plaintiff has not been proven by the defendant, and if it would be admitted upon the theory that it would be an excuse for non-performance it is premature.

"The COURT: I am inclined now to sustain the objection.

"Mr. HEREFORD: Further if your Honor please, the issuance of the attachments and injunctions prevented us from shipping the ore and extracting the ore, and I offer to show also that the garnishment prevented us from the right to take our own money and pay our employees so that we could go ahead with the contract, and that we were unable to go ahead with the contract by reason of it.

"The COURT: Counsel has stated in connection with this offer that one of the purposes of the offer is to show an excuse for the non-performance of certain requirements of the contract or I do not correctly understand you. That is one of the purposes of your offering this testimony as I understand you. Now, I am inclined to this view, that, you not having pleaded non-performance and excuse you may not at this time show it.

"I will rule against you on the merits. I do think this might be admissible for the purpose of showing non-performance, but that you not having pleaded non-performance and excuse may not show it at this time.

146 "Mr. HEREFORD: Then we make the same offer for the general purposes of the case, and for the purpose of showing that we were deprived thereby by the different acts stated, of the right to extract the ore and obtain $12.00 a ton therefor, and of the benefits we were to be entitled to under the contract without breaking the contract.

"Mr. IVES: We object to that on the same grounds stated before.

"The COURT: I shall sustain the objection. Your remedy I think is upon the injunction bond. I have ruled on that to this effect.

It is not admissible at this time to show non-performance. In your complaint you have not alleged non-performance, and excuse, you are not now entitled o show it.

"Mr. HEREFORD: We do not offer this to prove non-performance.

"The COURT: And you do not offer it as an excuse for non-performance?

"Mr. HEREFORD: I offer it as an excuse for non-performance, as proof of non-performance, and a deprivation of certain rights.

"The COURT: I shall rule adversely to you."

No request having been made to amend the complaint to conform to the proof offered, although the limitations of the complaint were thus directly brought to the attention of counsel, we think
147 on the pleadings as they stood the trial Court could not do otherwise than to refuse to admit the record in the attachment suit and the further proof that was offered to show that the attachment covered all the funds of the company and so did in fact prevent the deposit required.

The evidence of the plaintiff showed at the close of its case that on the 25th of July the company was ousted from the premises, and the damages suffered by it thereby. This was a clear breach of the contract for which such damages might be recovered by the company if at the time they had the legal right to maintain the claim. But apart from the limitations of the complaint, the evidence of the plaintiff also affirmatively showed that the company itself had prior to the ouster failed on its part to live up to the requirement of the contract in that the deposit of the ore proceeds had not been made as required, and no excuse therefor had been pleaded or proved. The company having elected to continue under the contract after the alleged acts of interference and hindrance by reason of the injunction and attachment suit was bound to perform its covenants or plead and prove excuse for failure so to do, and in default thereof, having itself committed the first breach of the contract, it could not maintain this action against the defendants for their subsequent breach of ouster. The trial Court was therefore right in
148 holding that on the pleadings and on the proof the company had not made out a cause for action, and in directing a verdict for the defendants.

Norrington vs. Wright, 115 U. S., 188.
Loudenback vs. Tennessee Co., 121 Fed., 298.

The judgment of the District Court is affirmed.

EDWARD KENT, *C. J.*

We concur:

RICHARD E. SLOAN, *A. J.*
FLETCHER M. DOAN, *A. J.*
FREDERICK S. NAVE, *A. J.*

And on the same day to-wit: the twentieth day of March, 1909, being one of the regular juridical days of the January term of said court, 1909, the following order and judgment, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

149 This cause having been heretofore submitted and by the Court taken under advisement, and the Court having considered the same and being fully advised in the premises:

It is ordered that the judgment of the District Court be and the same is hereby, affirmed.

It is further ordered, adjudged and decreed that the appellees herein do have and recover of and from The World's Fair Mining Company, a corporation, appellant herein, and the United States Fidelity and Guaranty Company of Baltimore, Md., surety on appeal bond, their costs in this court, taxed at Thirty-eight and 70/100 ($38.70) dollars, together with their costs in the court below in this cause incurred.

And to-wit: the third day of April, 1909, comes the appellant by its attorneys and files in the clerk's office of said court in said entitled cause its certain Motion for Rehearing in words and figures following, to-wit:

150 In the Supreme Court of the Territory of Arizona.

No. 1078.

THE WORLD'S FAIR MINING COMPANY, a Corporation, Appellant,
vs.
FRANK POWERS and JOSEPHINE POWERS, Appellees.

Motion for Rehearing.

Comes now the appellant, the World's Fair Mining Company, and moves this Honorable Court for a rehearing herein, for the following reasons:

I.

The Court erred in holding that the contract in question was an entire and not a severable contract; "that the undertakings on each side were mutual and dependent upon each other and that the right of the company to remain in possession during the life of the contract was dependent upon its fulfilling its obligation to account for, and turn over the proceeds derived by it from the reduction of the ores", for the reason that the contract clearly shows upon its face that appellant's right to the possession of the mines in no wise depended upon the payment of the proceeds of the shipments of any ore into the bank to the credit of Frank and Josephine Powers, and that the undertakings were wholly independent one of the other.

151 II.

The Court erred in deciding that "there is no allegation either of non performance or of excuse for non performance; the com-

plaint is silent as to any act of the company in compliance on its part with the terms of the contract, further than the obligation that it was in possession of the mines and of certain ores in process of shipment therefrom", for the reason that it is alleged in the complaint that "plaintiff was in possession of said mines and each and all thereof, and the improvements and other property thereon, and of certain ores then in process of shipment therefrom under and by the terms of the said contract", and further, "that at said time plaintiff was working, developing, and mining the said mines, and shipping ores therefrom under its said contract, and generally carrying on the business for which it was formed, and which it was authorized and entitled to carry on under the terms of its contract", and further "after setting forth the various acts committed by appellee- in an unbroken chain of efforts looking forward to the breaking of the contract in question, the complaint alleges "that defendants continued to harrass, impede, and defeat the efforts of the plaintiff to carry out the terms of its said contract".

III.

The Court erred in holding that "the allegations in the
152 complaint with respect to the attachment suit nowhere state or suggest that thereby the company was prevented fr- depositing the ore proceeds, or from performing any obligation on its part to be performed under the contract", for the reason that the complaint and proof offered and introduced on the trial of the case show clearly that the attachment suit was but one step in an unbroken line of procedure adopted by appellees leading up to, and which finally culminated in the breaking of appellant's contract, and was one of the steps taken by defendant- for which it was alleged in the complaint "that defendants continued to harrass, impede, and defeat the efforts of the plaintiff to carry out the terms of its said contract".

IV.

The Court erred in holding that the institution of the attachment suit was not a breach of the contract in question on the part of appellees, for the reason that at the time of the institution of the attachment proceedings appellant was not indebted to appellees in any sum; the time had not arrived for the deposit of any money in bank to the credit of appellees, and under the terms of the contract appellant was entitled to the free and uninterrupted possession of the mines unhampered in any way, and all of its other prop-
erty and money used, or to be used, or in any way connected
153 with the working and operation of the mines, and as appears from the pleadings and evidence in the case the attachment suit deprived appellant of the use of all its money and property in the Territory of Arizona, disabling it from prosecuting its work unhampered, as it was entitled to do under and by reason of the terms of the contract, and deprived it of the use, not only of the proceeds of ore shipped from the mines, and which under the contract was not due and payable to the credit of appellees for nine days, but also of several hundred dollars of appellant's funds in which appellees had no interest whatever.

V.

The Court erred in finding as a fact that "thereafter the company continued to work the mines, and the detrimental effect, if any, upon the company of the institution of the attachment suit had been overcome by the company prior to the commencement of this action", for the reason that the pleadings and testimony show that appellant never recovered from the effects of the attachment proceedings; that the attachment remained in full force and effect until the final determination of this action in the court below; that the attachment proceeding was but one of a continuous chain of acts set forth and prosecuted by appellees, for the purpose of depriving appellant of the advantages of its contract, and that the
154 allegations of the complaint "that when plaintiff had finally succeeded in overcoming the conditions occasioned by the wrongful and unlawful acts of defendants, etc", had no application whatever to the attachment proceedings, but applied wholly to the tying up of the ores and property at the mines by means of injunction suits filed at the time appellees instituted the attachment proceedings.

VI.

The Court erred in holding that "the pleading and proceedings in the attachment suit were not material, therefore, except as they might serve as an excuse for the company for the nonpayment of the ore proceeds", for the reason that the institution of the attachment suit, and the tying up of appellant's money and property, was in plain violation of the terms of appellant's contract; a deprivation of appellant's rights thereunder, and the first breach of the contract upon the part of either of the parties thereto, and the pleadings and proceedings were admissible for the purpose of showing a violation of the contract upon the part of appellees.

VII.

The Court erred in holding "that there is no allegation in the plaintiff's pleading to support the contention that such (attachment) suit did prevent performance, and hence render the evidence admissible", for the reason that the complaint clearly sets forth a compliance by appellant with the terms of the contract at
155 the time appellee- instituted the attachment suit, and after setting forth the various acts and things done by appellees constituting an unbroken chain of procedure from first to last, looking forward to the breaking of appellant's contract, the complaint alleges "that defendants continued to harrass, impede, and defeat the efforts of the plaintiff to carry out the terms of its said contract".

VIII.

The Court erred in finding as a fact that appellant committed the first breach of the contract, for the reason that the undisputed testimony shows that the contract had not been violated in any respect by appellant at the time of the institution of the attachment and

injunction proceedings by appellees, and that from that time on appellee continuously harrassed and impeded appellant in its efforts to carry out the terms of its contract, which efforts were finally defeated.

IX.

The Court erred in holding that it was incumbent upon appellant to plead performance of the conditions in question, or excuse for non performance, for the reason that appellees by the institution of the attachment and injunction proceedings, and the steps taken and the things done subsequent thereto, notified appellant that they would no longer live up to their part of the contract and
156 perform the same, thereby relieving appellant of the necessity of pleading either performance or excuse for not performing even a condition precedent under the contract, and for the further reason that it was incumbent upon appellees to specifically point out in their answer the violation of any condition of the contract upon the part of appellant that they chose to rely upon in order to defeat appellant's recovery in this action, and not having done so the condition was waived.

A brief in support of the above grounds will be filed herein.

Respectfully submitted,

FRANK H. HEREFORD,
FRANK E. CURLEY,
Attorneys for Appellant.

Service of Motion for Rehearing acknowledged.

And on to-wit: the thirtieth day of April, 1909, being one of the regular juridical days of the January term of said court, 1909, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

157 Title of Cause.

At this day it is ordered by the Court that the Motion for Rehearing filed herein by appellant, be submitted.

And on to-wit: the first day of May, 1909, being one of the regular juridical days of the January term of said court, 1909, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:—

Title of Cause.

At this day it is ordered by the Court that the Motion for Rehearing filed herein by appellant, and heretofore submitted, be, and the same is hereby, denied.

And on the same day to-wit: the first day of May, 1909, being one of the regular juridical days of the January term of said court, 1909, the following other order was had and entered of record in said cause in words and figures following, to-wit:—

Title of Cause.

At this day comes Mr. Frank E. Curley for appellant herein, in open court, and gives notice of appeal to the Supreme Court of the United States, from the judgment of this court, and

158 Upon motion of Mr. Frank E. Curley, it is ordered that the appeal be and the same is hereby allowed, the amount of the cost bond fixed in the sum of One Thousand ($1,000.) Dollars, and the mandate stayed for thirty days.

And on to-wit: the seventh day of July, 1909, comes the appellant by its attorneys and files in the clerk's office of said court in said entitled cause its certain motion for permission to withdraw its notice of appeal, and order granting said motion and vacating order allowing appeal, in words and figures following, to-wit:—

159 In the Supreme Court of the Territory of Arizona.

THE WORLD'S FAIR MINING COMPANY, a Corporation, Appellant,
vs.
FRANK POWERS and JOSEPHINE POWERS, Appellees.

Comes now the appellant herein, The World's Fair Mining Company, a corporation, and represents to this Honorable Court that heretofore and upon to-wit, the 20th day of March, 1909, the above entitled action being then pending before the above entitled court, judgment was rendered therein in favor of appellees and against appellant generally, affirming the judgment of the District Court of the First Judicial District of the Territory of Arizona, in and for Pima County. That thereafter a motion for a new trial was duly and regularly filed and entered and made which said motion was thereafter and on the first day of May, 1909, overruled and denied by the said above entitled court. That thereupon and on the said first day of May, 1909, this appellant by and through his attorneys, Frank H. Hereford and Frank E. Curley, gave notice of appeal, in open court, to the Supreme Court of the United States which said appeal was thereupon and then and there allowed. That the said notice of appeal and the allowance thereof was error in this, that the above entitled case was tried to a jury in the said District

160 Court aforesaid, and the only manner provided by law for the removal of the said case to the Supreme Court of the United States is by writ of error.

In view of the foregoing facts, appellant respectfully requests and moves this Honorable Court and the Honorable Edward Kent, Chief Justice thereof, for permission to withdraw the said notice of appeal heretofore given as aforesaid, and that the order granting the said appeal be vacated.

FRANK H. HEREFORD,
FRANK E. CURLEY.

It appearing that the allegations and statements set out in the foregoing motion are true and correct, the said motion is hereby

granted and leave is hereby given to the said appellant, The World's Fair Mining Company, to withdraw its said notice of appeal to the Supreme Court of the United States in the said above entitled action, and the said notice of appeal having been withdrawn by appellant, the said order of the Supreme Court of the Territory of Arizona, allowing the said appeal on May 1, 1909, as in said motion set out is hereby vacated and set aside.

EDWARD KENT,
Chief Justice of the Supreme Court of the Territory of Arizona.

161 And on the same day, to-wit: the seventh day of July, 1909, comes the appellant by its attorneys and files in the clerk's office of said court in said entitled cause its certain Petition for Writ of Error in words and figures following, to-wit:

In the Supreme Court of the Territory of Arizona.

THE WORLD'S FAIR MINING COMPANY, a Corporation, Plaintiff in Error,

vs.

FRANK POWERS and JOSEPHINE POWERS, Defendants in Error.

Petition for Writ of Error.

Your Petitioners, The World's Fair Mining Company, a corporation, Plaintiff in Error in the above entitled cause, respectfully shows: That the above entitled cause is now pending in the Supreme Court of the Territory of Arizona, and that a judgment has therein been rendered on the 20th day of March, 1909, affirming a judgment of the District Court of the First Judicial District of the Territory of Arizona in and for the County of Pima, and that thereafter a motion for rehearing was entered and filed in the said case, which said motion was thereafter and on the first day of May, 1909, overruled and denied by the said Supreme Court of the Territory of Arizona, and that the matter in controversy in said suit exceeds $5000.00 besides costs, and that the said case was tried before
162 a jury in the said District Court of the First Judicial District of the Territory of Arizona, in and for the County of Pima, aforesaid, and that the jurisdiction of none of the courts above mentioned is or was dependent in anywise upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of the different states, and that this cause does not arise under the patent laws nor the revenue laws, nor the criminal laws, and that it is not an admiralty case, and that it is a proper case to be reviewed by the Supreme Court of the United States upon writ of error; and, therefore, your Petitioner would respectfully pray that a writ of error be allowed it in the above entitled cause directing the Clerk of the Supreme Court of the Territory of Arizona to send the record and proceedings in said cause, with all things concerning the same to the Supreme Court of the United States, in order that the Errors complained of in the Assignment of Errors herewith filed by

said plaintiff in error, may be reviewed, and if error be found corrected according to the laws and customs of the United States.

THE WORLD'S FAIR MINING COMPANY,
Plaintiff in Error,

By FRANK H. HEREFORD,
FRANK E. CURLEY,
Its Attorneys.

163 The foregoing Petition is granted and Writ of Error allowed as praved for upon plaintiff giving bond according to law, in the sum of $1000.00.

EDWARD KENT,
Chief Justice of the Supreme Court of the Territory of Arizona.

Service admitted.

And on the same day, to-wit: the seventh day of July, 1909, comes the appellant by its attorneys and files in the clerk's office of said court in said entitled cause its certain Assignment of Errors, in words and figures following, to-wit:

164 In the Supreme Court of the United States.

THE WORLD'S FAIR MINING COMPANY, a Corporation, Plaintiff in Error,
vs.
FRANK POWERS and JOSEPHINE POWERS, Defendants in Error.

Assignment of Errors.

Now comes the Plaintiff in Error, the World's Fair Mining Company, by Frank H. Hereford and Frank E. Curley, attorneys, and says: That in the record and proceedings, aforesaid, of said Supreme Court of the Territory of Arizona in the above entitled cause, and in the rendition of the final judgment therein, manifest error has intervened to the prejudice of said Plaintiff in Error, in this, to-wit:

First. Said Supreme Court of the Territory of Arizona erred in entering a judgment affirming the judgment of the District Court of the First Judicial District of the Territory of Arizona, in and for the County of Pima, in entering judgment in favor of Defendants in Error and against Plaintiff in Error, and costs of suit, entered on the 25 day of May, 1908.

Second. Said Supreme Court of the Territory of Arizona, erred in not reversing the said judgment of the District Court of the First Judicial District of the Territory of Arizona, in and for the County of Pima, aforesaid, and in not remanding said cause to said
165 District Court for a new trial.

Third. The Supreme Court erred in not reversing the judgment of the District Court, for the reason that the District Court erred in instructing the jury to render a verdict in favor of the defendants, for the reason that the complaint stated a good cause of action, and the allegation of the complaint was supported by evidence which was admitted, and was corroborated by evidence which was wrongfully excluded.

Fourth. The Supreme Court erred in not reversing the judgment of the District Court, for the reason that the District Court erred in refusing to permit plaintiff to introduce the papers and records of the case entitled, Frank and Josephine Powers vs. The World's Fair Mining Company, for the reason that it was the best evidence to sustain certain of the allegations of the complaint that the defendants had harrassed, impeded, and defeated plaintiffs in their efforts to perform a contract.

Fifth. The Supreme Court erred in not reversing the judgment of the District Court, for the reason that the District Court erred in refusing to permit plaintiff to prove that the defendants had received and retained seven thousand odd dollars (the proceeds of ore shipped),
which money had been deposited in the Nogales bank and
166 garnished by defendants, for the reason that the *payment* on the part of plaintiff to pay said money to the Tucson bank was one of the breaches of the contract relied upon by defendant as a defense to this action, and for the further reason that in handling and shipping of the ore in question, and receiving the proceeds thereof plaintiff was but the agent of defendants, and the admission of *his* testimony would have shown that defendants (by reason of the garnishment proceedings) had received this money long prior to the date when it would become due, and for the further reason that the payment by plaintiff of the proceeds of the ore in question into the Arizona National Bank of Tuscon, Arizona, was not either by the contract or the pleadings in the case made a condition precedent to plaintiff's right of recovery.

Sixth. The Supreme Court erred in not reversing the judgment of the District Court, for the reason that the District Court erred in refusing to permit plaintiff to prove that it had made all arrangements necessary for it to obtain money with which to carry on the contract, for the reason that the answers set up plaintiff's alleged insolvency and inability to pay its debts and expenses of carrying on the contract.

Seventh. The Supreme Court erred in not reversing the judgment
of the District Court, for the reason that the District Court
167 erred in not permitting plaintiff to prove that plaintiff had good reason not to bring any money and resources into the Territory, for fear defendants would attach and garnish it, because the inability of plaintiff to bring money into the Territory and use it freely aided in preventing plaintiff from carrying out the contract.

Eighth. The Supreme Court erred in not reversing the judgment of the District Court, for the reason that the District Court erred in not permitting witness Webber to testify as to the value of the contract, for the reason that Webber had testified that he knew the value thereof, and the value of the contract was one of the material issues involved in the litigation.

Ninth. The Supreme Court erred in rendering judgment against the plaintiff in error, and in favor of said defendant in error for costs of suit in said Supreme Court.

Wherefore, the said, The World's Fair Mining Company, a corporation, Plaintiff in Error, prays that for the errors aforesaid, and

other errors appearing in the record of said Supreme Court of the Territory of Arizona in the above entitled cause, to the prejudice of the plaintiff in error, the said judgment of the said Supreme Court of the Territory of Arizona be reversed, annulled and for
168 naught esteemed, and that said cause be remanded to the Supreme Court of the First Judicial District of the Territory of Arizona, in and for the County of Pima, with instructions to grant a new trial in said cause, or for such further proceedings in such cause as may be determined by this Honorable Court, to the end that justice may be done in the premises.

FRANK H. HEREFORD,
FRANK E. CURLEY,
Attorneys for Plaintiff in Error.

Serivce admitted.

And on the same day, to-wit: the seventh day of July, 1909, there was filed in the clerk's office of said court in said entitled cause a certain Bond in words and figures following, to-wit:

169 In the Supreme Court of the Territory of Arizona.

THE WORLD'S FAIR MINING COMPANY, a Corporation, Appellant,
vs.
FRANK POWERS and JOSEPHINE POWERS, Appellees.

Know all men by these presents, That we, The World's Fair Mining Company, a corporation, as principal, and The United States Fidelity and Guaranty Company as surety, are held and firmly bound unto Frank Powers and Josephine Powers, and each of them, in the full and just sum of One Thousand ($1,000.00) Dollars, to be paid to the said Frank Powers and Josephine Powers, their certain attorneys, executors, administrators or assigns, to which payment well and truly to be made we bind ourselves, our successors and assigns, jointly and severally firmly by these presents.

Sealed with our seals and dated this 19th day of June, in the year of our Lord, One Thousand Nine Hundred and Nine.

Whereas lately at a session of the Supreme Court of the Territory of Arizona, in a suit pending in said Court between The World's Fair Mining Company, a corporation, appellant, and Frank Powers and Josephine Powers, appellees, (being case No. 1078 as appears from the records of said Court), a final judgment was
170 rendered against the said appellant, The World's Fair Mining Company, a corporation, and the said The World's Fair Mining Company, a corporation, appellant, having obtained from said Court a Writ of Error to reverse the judgment in the aforesaid suit, and a Citation directed to said Frank Powers and Josephine Powers is about to be issued, citing and admonishing them to be and appear at a session of the Supreme Court of the United States to be holden at the City of Washington, on the — day of ——, 1909, next.

Now the condition of the above obligation is such that if the said The World's Fair Mining Company, a corporation, shall prosecute its Writ of Error to effect, and shall answer all damages and costs that may be awarded against it if it fails to make its plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

THE WORLD'S FAIR MINING COMPANY, [SEAL]
By RAY FERGUSON, *Its President.*

Attest:
—— ——, *Secretary.*

171 THE UNITED STATES FIDELITY AND GUARANTY COMPANY, [SEAL]
By BRACEY CURTIS,
Att'y in Fact, and
EB. WILLIAMS,
Att'y in Fact,
Its Attorneys.

Approved:
EDWARD KENT,
Chief Justice of the Territory of Arizona.

Approved the within Bond this 23rd day of June, A. D., 1909.
F. A. TRITLE, JR, *Clerk.*

172 UNITED STATES OF AMERICA,
Territory of Arizona:

I, F. A. Tritle, Jr., Clerk of the Supreme Court of the Territory of Arizona, do hereby certify the above and foregoing to be a full, true and complete copy and Transcript of the Record, including the Abstract of Record as corrected with original papers on file, Opinion, Judgment, Motion for Rehearing, Motion to withdraw Appeal and Order granting Motion, Petition for Writ of Error, Assignment of Error, Bond on Writ of Error, and all minute entries had and entered of record in a certain cause lately pending in said court, No. 1078, wherein The World's Fair Mining Company, a corporation, was Appellant, and Frank Powers and Josephine Powers were Appellees, as the same remain on file and of record in my office.

And I further certify that the same constitute the record in said cause.

And I further certify that the attached Writ of Error, Citation, and Order of Enlargement, are the originals issued by said Supreme Court.

In witness whereof, I have hereunto set my hand and the seal of said Court, this 6th day of October, A. D. 1909, at Phœnix, Arizona.

[Seal Supreme Court of Arizona.]

F. A. TRITLE, JR.,
Clerk Supreme Court.

173 In the Supreme Court of the United States.

THE WORLD'S FAIR MINING COMPANY, a Corporation, Plaintiff in Error,
vs.
FRANK POWERS and JOSEPHINE POWERS, Defendants in Error.

Writ of Error.

THE UNITED STATES OF AMERICA, *ss*:

The President of the United States to the Honorable Judges of the Supreme Court of the Territory of Arizona, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in said Supreme Court of the Territory of Arizona before you, or some of you, between The World's Fair Mining Company, a Corporation, Plaintiff in Error, and Frank Powers and Josephine Powers, Defendants in Error, a manifest error hath happened, to the great damage of the said Plaintiff in Error — by *their* Complaint appears, *it* being willing that error, if it hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within sixty days from the date hereof, that, the record and proceedings aforesaid be- in-
174 spected, the said Supreme Court may cause further to be done therein to correct that error, what of right, according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, the 23 day of June, in the Year of our Lord One Thousand Nine Hundred and Nine.

F. A. TRITLE, JR.,
Clerk of the Supreme Court of the Territory of Arizona.

Allowed by,
EDWARD KENT,
Chief Justice of the Supreme Court of the Territory of Arizona.

175 [Endorsed:] No. 1078. In the Supreme Court of the United States. The World's Fair Mining Company a corporation Plaintiff in error vs. Frank Powers and Josephine Powers Defendants in error. Writ of Error. Filed this 7th day of July 1909. F. A. Tritle Jr. Clerk. By Angie B. Parker Deputy. Service admitted and copy received this — day of July 1909. Eugene S. Ives, Attorneys for defendants in error. Frank H. Hereford, Attorney for ——.

176 In the Supreme Court of the United States.

THE WORLD'S FAIR MINING COMPANY, a Corporation, Plaintiff in Error,

vs.

FRANK POWERS and JOSEPHINE POWERS, Defendants in Error.

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Frank Powers and Josephine Powers, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States to be holden at Washington, within sixty days from the date hereof pursuant to a Writ of Error filed in the Clerk's Office of the Supreme Court of the Territory of Arizona, wherein The World's Fair Mining Company, a Corporation, is plaintiff in error, and you are defendants in error, to show cause if any there be, why the judgment rendered against the said plaintiff in error as in the said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 23 day of June, in the year of our Lord One Thousand Nine Hundred and Nine.

EDWARD KENT,
Chief Justice of the Supreme Court of the Territory of Arizona.

177 & 178 Service of the within citation and receipt of a copy thereof admitted this 6th day of July, 1909.

EUGENE S. IVES,
Solicitor for Defendants in Error, Frank & Josephine Powers.

[Endosred:] No. 1078. In the Supreme Court United States. The World's Fair Mining Company, a corporation, Plaintiff in error, vs. Frank Powers and Josephine Powers, Defendants in error. Citation. Filed this 7th day of July 1909. F. A. Tritle, Jr., Clerk. by Angie B. Parker Deputy.

179 In the Supreme Court of the United States.

No. 1078.

THE WORLD'S FAIR MINING COMPANY, a Corporation, Plaintiff in Error,
v.
FRANK POWERS and JOSEPHINE POWERS, Defendants in Error.

Order Enlarging Time for Docketing and Filing Record in the Supreme Court of the United States.

The above named Plaintiff in Error having sued out a Writ of Error to the Supreme Court of the Territory of Arizona from the judgment of the said Supreme Court of the Territory of Arizona, and good cause having been shown why the time within which the case may be docketed and the record filed with the Clerk of the Supreme Court of the United States, should be enlarged it is hereby

Ordered That the time within which the case may be docketed and the record filed with the Clerk of the Supreme Court of the United States, be, and the same is, hereby enlarged until and including the sixteenth day of October, 1909 and the return day of the citation heretofore filed and served upon such Writ of Error is hereby enlarged and extended until said last named day.

Dated August 14, 1909.

EDWARD KENT,
Chief Justice Supreme Court,
Territory of Arizona.

180 [Endorsed:] No. 1078. In the Supreme Court of the United States. The World's Fair Mining Company, a Corporation, Plaintiff in Error, v. Frank Powers and Josephine Powers, Defendants in Error. Order enlarging time for Docketing and Filing Record in the Supreme Court of the United States. Filed August 17, 1909. F. A. Tritle, Jr., Clerk.

Endorsed on cover: File No. 22,017. Arizona Territory Supreme Court. Term No. 207. The World's Fair Mining Company, plaintiff in error, vs. Frank Powers and Josephine Powers. Filed February 11th, 1910. (22,017.)

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 207.

THE WORLD'S FAIR MINING COMPANY, Plaintiff in Error,
vs.
FRANK and JOSEPHINE POWERS, Defendants in Error.

Whereas exceptions were duly taken, noted, and properly made part of the record in this case to all ruling of the Trial Court upon the trial of the case at the time such rulings were made, and

Whereas, the record of this case transmitted to the Supreme Court of the Territory of Arizona shows that such exceptions were so taken, and

Whereas, the transcript of record in this case by error on the part of the Clerk of the Supreme Court of the Territory of Arizona does not show that all such exceptions were so taken and made of record in this case,

It is hereby stipulated and agreed that the record in this case with the permission of this Court may be amended so as to show the fact that exceptions were duly taken, noted, and properly made of record to all the rulings of the Trial Court upon the trial of this case at the time such rulings were made; that application can be made to this Court by either party hereto for the correction of the record in this regard, and that upon permission being obtained for so doing in this Court, that the Clerk of this Court amend the transcript of record in the most convenient manner so as to show that all exceptions were properly taken, and the parties hereto hereby waive any rights they may have to any objections that might be made by reason of the fact that the original transcript of record in this case fails to show that such objections were taken and properly made a part of the record of this case.

Dated Tucson, Arizona, Feb. 12, 1912.

FRANK H. HEREFORD,
F. E. CURLEY,
Attorneys for Plaintiff in Error.
EUGENE S. IVES,
Attorneys for Defendants in Error.

[Endorsed:] File No. 22,017. Supreme Court U. S. October Term, 1911. Term No. 207. The World's Fair Mining Co., Pl'ff in Error, vs. Frank Powers and Josephine Powers. Stipulation to amend record. Filed February 23, 1912.

No. 207.

Supreme Court of the United States

WORLDS FAIR MINING COMPANY,

Plaintiff in Error,

—vs.—

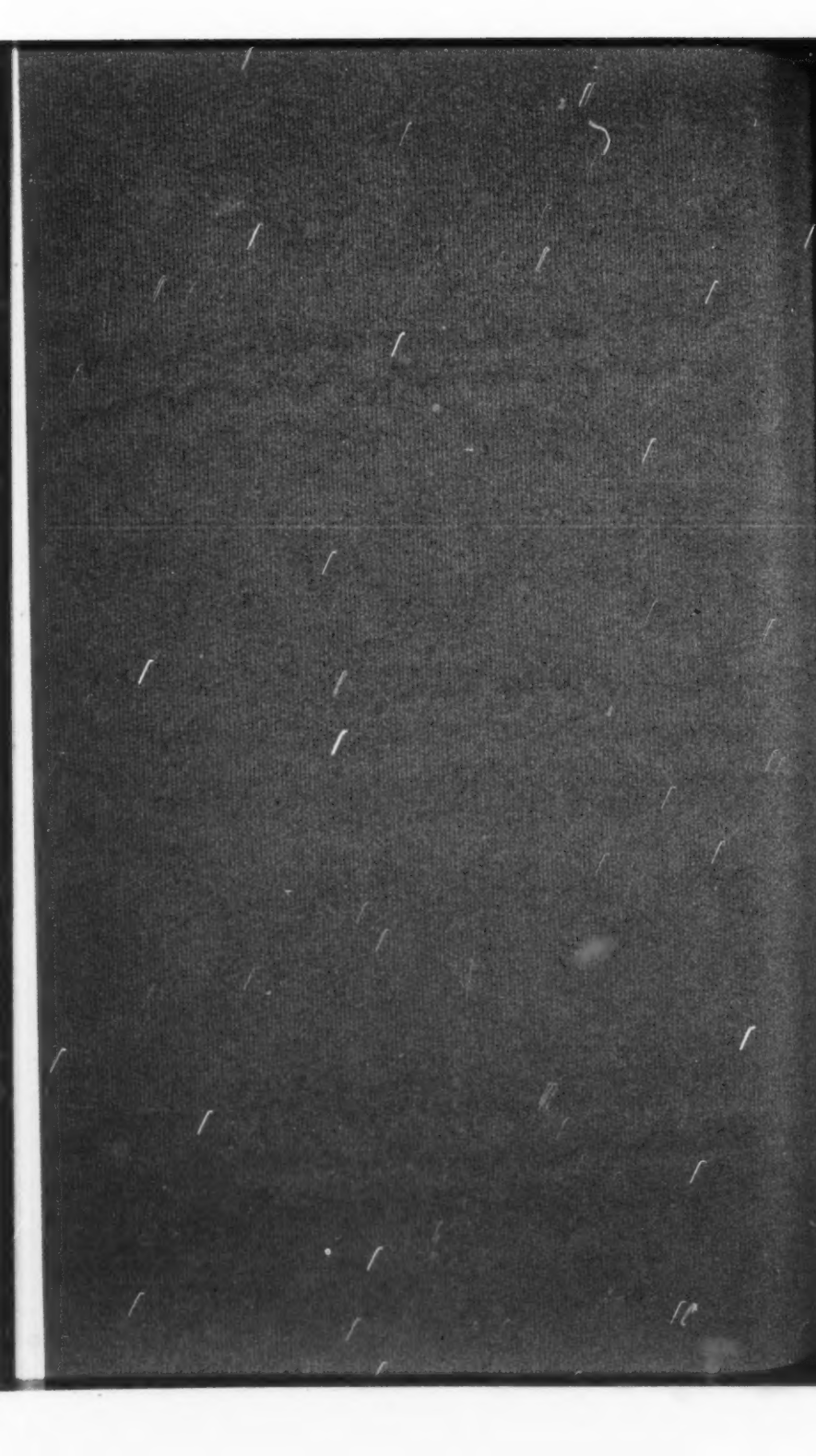
FRANK POWERS AND JOSEPHINE POWERS,

Defendants in Error.

Brief of Plaintiff in Error

FRANK H. HERRFORD,
F. E. CURLEY,
Attorneys for Plaintiff in Error.

Leader Press, Winona, Minn. 1912



Supreme Court of the United States

WORLDS FAIR MINING COMPANY,
Plaintiff in Error.

—*vs.*—

FRANK POWERS AND JOSEPHINE POWERS,
Defendants in Error.

STATEMENT OF CASE

Plaintiff in Error, The Worlds Fair Mining Company, as plaintiff in the lower Court, commenced this suit against defendants in error, as defendants, in the Second Judicial District Court of Arizona, for Santa Cruz County, claiming damages against defendants in error for breach of contract. The case was tried in said court and judgment entered for defendants in error. This judgment was set aside upon motion for a new trial duly made and the venue of the case was subsequently transferred to the First Judicial District Court of Arizona, sitting in Pima County. The case was again tried in the last named Court before a jury. After the evidence for the plaintiff in error was completed, and some evidence for defendants in error was introduced,

the Court instructed the jury to return a verdict for defendants in error, which was done, and judgment entered accordingly. Plaintiff in error appealed the case to the Supreme Court of Arizona, where the judgment of the lower Court was affirmed, and plaintiff in error then brought the case to this Court upon Writ of Error.

The facts brought out upon the trial of the case as shown by the record are as follows: On Sept. 4, 1903, Frank Powers, and Josephine Powers, his wife, the defendants in error herein, the owners of the mines hereinafter referred to, entered into a contract with one Ray Ferguson, for the sale of a certain group of mines known as the Worlds Fair Mines, situated in said Santa Cruz County and belonging to Defendants in error. The material conditions of the contract are as follows: In consideration of the sum of Ten Dollars, and the further considerations expressed in the contract, Defendants in error agreed to sell the said Ferguson the said Worlds Fair Mines. The sale of the said mining properties shall be under the following conditions, to-wit: That the said party of the second part" (Ray Ferguson) "shall, on or before the expiration of ninety days from the date hereof, begin active work on the property hereinbefore mentioned, and known as the Worlds Fair Group of Mines, and shall prosecute such work at the minimum rate of not less than two feet per day, in sinking and drifting on or below the present main level of the said Worlds Fair Mine, and shall continue such work at such stipulated rate until the full amount of One Thousand feet of work has been so performed in a workmanlike and customary manner." That fifty feet of work per month should be considered the same as two feet per day. The expiration of the contract was to be "upon the completion of the aforesaid One Thousand feet of work or until such time as the party of the second part shall pay or cause to be paid to the

parties of the first part, the full sum of Four Hundred and Fifty Thousand Dollars, in lawful money of the United States, and shall deliver to said parties of the first part one-fourth of the Capital Stock, fully paid up and non-assessable, of a company to be organized by the said party of the second part": Powers and his wife agreed to place a deed of all said mines in escrow in the Arizona National Bank of Tucson, Arizona; the conditions of the escrow be that if the said Ferguson should well and faithfully perform his part of the agreement, the deed, together with certain moneys to be derived from the sale or treatment of ore and deposited in said bank should be delivered to said Ferguson; it was further agreed that ores extracted or on the dumps should be treated on the ground or shipped to a smelter; that Twelve Dollars per ton should be allowed said Ferguson for ores treated on the ground and Twelve Dollars per ton plus shipping and smelting charges should be allowed Ferguson on ores shipped to a smelter, and "the party of the second part is hereby authorized and he agrees to ship such products and after the deductions of the said shipping and smelting charges to deposit in trust in the Arizona National Bank, Tucson, Arizona, the net proceeds therefrom, the same to remain in trust in said bank until the expiration of this agreement", at which time they should become the property of the said Ferguson if he completed the purchase of the said mines; otherwise they were to become the property of the said Powers and wife; Ferguson agreed to organize a stock company to operate and work said mines.

The contract further provided that, "If for any reason, other than an act of God, the said party of the second part shall fail to commence work within the said ninety days as herein agreed upon, or shall fail to prosecute the work in the manner and at the rate herein agreed upon, then this agreement shall

become null and void, and the deeds to said property, together with any moneys, the product of the ore shipped or treated, as hereinbefore described, shall revert to the said parties of the first part without recourse by the party of the second part."

The contract further provided that if Ferguson should fail to perform his covenants in the agreement contained, all machinery and permanent improvements, put by him on the mines, should become the property of Powers and his wife. The provisions, covenants, and contracts contained in the agreement extended to and bound the heirs, executors, administrators, and assigns of the parties to the agreement. (*Transcript P. 8-10, Fols. 15-20.*)

Ferguson immediately took possession of the mines and began work under the contract. This he continued on to February 9, 1904, when he assigned the contract to the London-Glasglow Development Company. (*Trans. P. 51, Fol. 105-6, and P. 28, Fol. 59.*)

The London-Glasglow Company took possession and continued the work up to April 15, 1904. (*Trans. P. 51-2, Fols. 107-8, and P. 28, Fol. 59.*) Previous to April 15, 1904, Defendants in error had failed and refused to place their deed in escrow as provided for in the contract and a dispute had arisen between Defendants in Error on the one part and Ray Ferguson and the London-Glasglow Company on the other part as to the rights of the latter to retain Twelve Dollars per ton on all ore not treated on the ground but shipped to a smelter. On April 15, 1904, Defendants in Error, Ray Ferguson, and other representatives of the London-Glasglow Development Company met at the office of Mr. Ives, the attorney for defendants in error in Tucson, where they all participated in the organization and formation of Plaintiff in error, The

Worlds Fair Mining Company. Defendant in error, Frank Powers, being elected one of its directors. Plaintiff in error was organized by them for the purpose of taking over this contract originally entered into between Defendants in error and Ray Ferguson. (*Trans. of R., P. 28, Fol. 59.*) There the matters in dispute were discussed. Defendants in error did not claim that the contract had been terminated or abrogated but they did claim that the Twelve Dollars a ton on ores not treated on the ground but shipped to a smelter could not be charged and retained by the London-Glasglow Company or Ferguson under the contract. The discussion subsequently resulted in the organization of the Worlds Fair Mining Company as aforesaid, and in the execution of two documents, hereinafter described, one expressly modifying the terms of the original contract, the other being an escrow instruction to the said Arizona National Bank, under which the deeds were to be deposited. (*Trans. P. 28-30, Fols. 59-62.*)

At the same time the London-Glasglow Development Company assigned the contract and all of its property to The Worlds Fair Mining Company. (*Trans. P. 53, Fol. 110.*)

The agreement entered into on the 15th day of April, 1904, modifying the said contract was signed by the London-Glasglow Development Company and Ray Ferguson. It was stated to be between the two said parties as parties of the second part, and Defendants in error as parties of the first part. The consideration was One Dollar. It provided, "Nowtherefore, it is hereby agreed that the said contract of the 4th of September, 1903, is amended and modified to this effect: That all moneys agreed to be deposited with the said Arizona National Bank in and by said contract, shall not be deposited in trust as in said contract provided,

but shall be deposited to the joint account of Frank and Josephine Powers, and upon being so deposited, shall at once be the absolute property and at the immediate disposal of the said Frank and Josephine Powers, and the said sum shall be credited upon the $450,000 cash consideration in said contract provided for; and upon the deposit of said sums to the said account of Frank and Josephine Powers, the parties depositing the same shall be at once released from all further liability upon the amounts of such deposits and all risks thereof." (*Trans. P. 13, Fols. 25-6.*)

The other document executed at said time, viz: The escrow instruction, contained no statement that it was intended to modify or amend the said original contract nor is there any language in it directly or inferentially stating that it was intended to amend or modify said contract. Summarized, the material contents of it are as follows: It was addressed to the Arizona National Bank of Tucson, Tucson, Arizona, and gave notice that the deed from Frank Powers and Josephine Powers, his wife, to Ray Ferguson, for The Worlds Fair Group of Mines and the deed from Ray Ferguson and his wife, Jessie Ferguson, and the London-Glasglow Development Company, to the Worlds Fair Mining Company were placed in escrow in said bank with the following instructions: Upon the payment of $450,000, and the delivery of a certificate for Fifty Thousand shares of the capital stock of the Worlds Fair Mining Company, the bank was to send the deeds for record to the County Recorder of Santa Cruz County with instructions to record the same and then deliver them to Ray Ferguson; that if Defendants in error should, at any time, previous to the payment of said money and delivery of said certificate of stock, demand in writing that the bank ascertain whether the said Ferguson had, during any calendar month, failed to do fifty feet of sinking

or drifting on said mines or failed to deposit to the credit of Defendants in error all sums of money in excess of Twelve Dollars per ton, plus the expense of shipment and smelter treatment received from shipments of ore by said Ferguson for more than fifteen days after the receipt by the shipper of the returns from such shipment, or if the said Defendants in error should, at any time, notify said bank that the said Ferguson had done One Thousand feet of sinking or drifting in said mines, the said bank, should, upon the deposit of a sufficient sum of said Defendants in error, designate someone to ascertain the facts, and if such persons should certify in writing to said bank that said fifty feet of work per month had not been done, or said sums received from shipments of ore not so deposited as aforesaid, or that said One Thousand feet of sinking or drifting on said mines had been done, then and in that case, the bank should deliver the said deed executed by Defendants in error to their order and should destroy the deed executed by Ray Ferguson and wife and London-Glasglow Development Company to The Worlds Fair Mining Company. There was nothing in the language of the escrow instructions showing intent or design to modify the language of the original contract or provide any penalties for failures to perform the conditions of the escrow agreement other than the delivery of the one deed and the destruction of the other as aforesaid. These escrow instructions were signed by Defendants in error and Ray Ferguson. (*Trans. P. 10-12, Fols. 20-24.*)

Shortly afterwards The Worlds Fair Mining Company took posession of the mines, began and continued to work thereon, and fully performed under the contract till prevented by Defendants in error's interference and till its ouster as hereinafter set forth. It shipped two carloads of ore, the proceeds of which, viz: $7672.78, was received by

the First National Bank of Nogales, Santa Cruz County, Arizona, (the bank at which Plaintiff in error did its business), on June 6, 1904. On June 11, 1904, this money was garnished in the hands of said bank in the case of Powers et al vs. The Worlds Fair Mining Company, hereinafter referred to, and $6930.69 thereof was, on May 27, 1905, paid to the sheriff on order of the Court in said garnishment proceedings, the balance on May 29, 1905, being similarly paid in on other garnishment proceedings. (*Trans. P. 41, Fol. 85-86.*)

Two months subsequent to April 15, 1904, Defendants in error brought suit against Plaintiff in error, the London-Glasglow Company and Ray Ferguson. (*Trans. P. 30, Fol. 63.*)

Plaintiff in error on the trial of the case at bar offered in evidence the complaint, affidavits on attachments, affidavits for garnishments and affidavits on injunctions, signed and sworn to by Mr. Powers, the attachments and garnishments themselves, the returns of the officers thereon, the orders dissolving the injunctions, the different minute entries relating thereto, and the answer of the Defendant in the said case brought by Defendants in error against Plaintiff in error together with the judgment rendered in said case. Defendants in error herein objected to the evidence on the ground that the complaint in said case did not state facts sufficient to constitute a wrongful or malicious attachment; that it was not an action on the bond of attachment, and that the remedy of the Plaintiff was limited to an action on the bond to secure damages. Or if he claimed that it was without cause and malicious to recover damages he claimed he suffered by reason of the attachment. After some argument the following objection was made, "The complaint in this case does not arise out of the attachment or any proceedings under the attachment or the injunction or the garnishment, for

the reason that it is neither an action upon the bond nor an action for malicious prosecution. The complaint fails to contain the allegations necessary in an action for the malicious and unlawful misuse of the process by attachment and such a cause of action if it might be stated, would be wholly inconsistent. * * * * * That the bringing of the suit, the issuance and levy of the writ of attachment and garnishment as alleged, and the issuance and service of the Writs of Injunction as allegated, and all the proceedings had in that action, do not constitute any breach of any covenant of this contract. It is incompetent, immaterial and irrevelant generally and specifically for the reasons already stated."

The Court took the objection under advisement and later sustained the objection. *Trans. P. 31, Fols. 64-5, and P. 38-39, Fols. 79-81.)*

Thereupon attorney for Plaintiff in error asked leave to avow what he expected to prove by the said different papers, which being given, Plaintiff in error avowed at length and in detail the facts to be proven by said papers. Condensing the avowal, Plaintiff in error offered by said papers to prove that the case was wrongfully and unlawfully brought and prosecuted by the making of false and untrue allegations and affidavits; that Plaintiff in error did not owe Defendants in error any sum then due; that in the case, garnishments and attachments were served on all Plaintiff in error's property and maintained till a final judgment some years later was rendered in Plaintiff in Error's favor, upon all the points in issue, that injunctions were caused to issue and to be served prohibiting Plaintiff in error from performing some of the conditions of the contract. And by and in the said suit such action was taken by Defendants in error as to harass, impede and defeat Plaintiff in error from performing under the contract, and by reason of said suit and the steps

taken by Defendants in error therein Plaintiffs in error were unable to go ahead with the contract. (*Trans. P. 35-39, Fols. 72-81.*)

Continuing the facts as brought out on the trial: The Worlds Fair Mining Company continued to work the mines till on July 25, 1904, when Defendant in error, Frank Powers, armed himself, "with rifle and six-shooter, and went to the employees of the Worlds Fair Mining Company" and told them that he would not allow them to work or do anything there. He took forcible possession of the property together with all Plaintiff in error's improvements, machinery and supplies, and has ever since kept Plaintiff in error out of possession. He admitted and it was on the trial of the case expressly admitted that at the time he took such possession of the mines, the fifty feet of work per month, making a total of between four and five hundred feet of work, had been done according to the terms of the contract. (*Trans. P. 31-32, Fol. 65-67, P. 34, Fol. 71, and P. 39, Fol. 81.*) After Powers had thus taken possession of the mines he took possession of ores, shipped by The Worlds Fair Mining Company, and then at a railroad station at Patagonia in said Santa Cruz County, and shipped it to a smelter, received the returns of it and has ever since kept and retained all of said returns. He did the same with other ore upon the dump of said mines and with the proceeds of such ore. (*Trans. P. 32-34, Fol. 67-70.*)

On the trial of the case when Defendant in error, Powers, was testifying, Plaintiff in error asked him the question, "Mr. Powers, did you not receive the sum of Six Thousand odd Dollars from the First National Bank of Nogales, since the time you took possession of those mines in July, 1904?" Defendant in error objected to the question on the grounds that it was immaterial and not based upon any allegation of the complaint. Plaintiff in error

avowed that it wanted to show that some Seven Thousand Dollars received from ores shipped from the Worlds Fair Mining Company under its contract and placed in the bank to the credit of Plaintiff in error was paid to Mr. Powers, that the latter had never accounted for it or any portion of it to the Plaintiff in error, but has ever since kept it all. The Court sustained the objection. (*Trans. P. 39-40, Fol. 82-83.*)

N. E. WEBBER, a witness for Plaintiff in error, testified that he knew the value of the contract that Plaintiff in error had with Defendant in error. Plaintiff in error asked him the question, "Will you state that value". The question was objected to by Defendant in error. Plaintiff in error avowed that it would prove by the testimony excluded by the Court that the witness Webber knew the value of the contract, knew what it could be sold for and that Plaintiff in error could prove by said witness that he knew the value of the contract would have been Two Hundred Thousand Dollars if the Defendant in error had not taken possession of the property from The Worlds Fair Mining Company; that Plaintiff in error would further prove that Defendants in error had waived their right to show that Mr. Webber was not competent to give that evidence and for Plaintiff in error to introduce it, by their objecting to and preventing witness from stating the reasons why he knew the value of the contract. The Court sustained the objection to the evidence. (*Trans. P. 41-43, Fol. 86-89.*)

Plaintiff in error asked one of its witnesses, Dr. Stewart, the following question,"After the conversation and after you left Arizona, I will ask you to state without saying whom you talked with, or anything of that kind, unless they bring it out by cross-examination, as to what you did along the lines towards financing these properties in the way you

suggested?" Defendants in error objected on the ground that the evidence was immaterial and self-serving. Plaintiff in error avowed that it expected to prove by this witness that he went to Winona and there made all necessary arrangements for the purpose of raising between Twenty-five and Fifty Thousand Dollars and made other arrangements to bring out to these mines certain people who would pay $450,000, the purchase price of the mines under the contract if certain reports referred to in the avowal were confirmed by further examination; that these negotiations were so far under way that they would have been consummated in a few weeks if they had not absolutely been stopped by the bringing of the Powers suit. The Court sustained the objection and excluded the evidence. (*Trans. of Error, P. 45, Fol. 93-94.*)

Plaintiff in error started to ask a question of one of its witnesses on the stand, Dr. Ray Ferguson. Objection was made and sustained by the Court before the question was finished. Plaintiff in error avowed that it expected and offered to prove by the witness that Plaintiff in error was afraid to have their money and resources brought into the Territory of Arizona for fear it would be attached and garnished and it would thereby accomplish no good and would not enable Plaintiff in error to use it or pay it out. For that reason Plaintiff in error did not dare to bring any resources into the Territory. The avowal was objected to by Defendants in error and the objection sustained by the Court. (*Trans. P. 51, Fol. 107.*)

Plaintiff in error expended about $35,000.00 in work, improvements and machinery under the contract on said mines. (*Trans. P. 48, Fol. 100, and P. 51, Fol. 106.*)

THE PLEADING.

The complaint in this suit alleged the execution of the contract and all the material parts thereof; the execution of the modifying contract and escrow instructions, a copy of each instrument being attached and made a part thereof; the assignments to Plaintiff in error of the contracts, etc., and all property of Plaintiff in error's predecessors in interest; the wrongful and unlawful bringing of the said suit by Defendants in error against Plaintiff in error, the issuance of attachments and garnishments therein and their levy upon all the proprety of Plaintiff in error in Arizona; that Plaintiff in error was prevented from bringing other assets into Arizona by reason of Defendants in error's threats to attach and garnish them; the service of injunctions in said suits interfering with Plaintiff in error's performance under the contract; the maintenance of said suits, attachments and garnishments for years; the expenditure of about $35,000 by Plaintiff in error in machinery, improvements, etc. on said mines, under the contract; that at the time the suit was brought Plaintiff in error "was working, developing and mining the said mines, and shipping ores therefrom, under its said contracts and generally carrying on the business for which it was formed and which it was authorized and entitled to carry on under the terms of said contract;" that the suit was brought and maintained by reason of false affidavits made by one of Defendants in error, to harass, annoy and prevent Plaintiff in error from performing the contract and obtain the benefits thereof, and that Defendants in error did so harass, impede and defeat Plaintiff in error's efforts to carry out the contract; that said contracts and the rights and privileges thereunder were worth not less than One Hundred and Fifty Thousand Dollars over and above obligations, payments, and expenses, Plain-

tiff in error would have had to assume, made, cause to be made or paid; that on July 25, 1904, Defendants in error wrongfully and unlawfully, with force and arms, took possession of said mines, mining claims, improvements, machinery, etc., from Plaintiff in error and his agents, and ever afterwards refused and still refuses to permit Plaintiff in error to again take possession of said mines, or to perform under the contract, by reason of which Plaintiff in error was deprived of every asset it possessed in Arizona and prevented it from bringing other assets into Arizona and is and has been unable to carry on its said business of working said mines and shipping said ores or of enjoying any of its benefits and rights under its said contracts and that Plaintiff in error's contracts have hereby been rendered and made of no value, other than springs from its rights to recover from Defendants in error in this action; to Plaintiff in error's damage in the sum of $185,000. (*Trans. P. 1-13, Fol. 1-26.*)

The amended answer of Defendants in error admitted the execution of the said original contract, amended contract, and escrow instructions, and generally denied the other allegations of the complaint and alleged that the said Ray Ferguson was at all times the President of the said London-Glasglow Development Company, the General Manager of Plaintiff in error and one of the largest stockholders of both companies; that the stock of both said companies was substantially owned by one Booth, one Stewart, and other associates, residents of Minnesota;that the said Ferguson and his associates, under the name of the London-Glasglow Development Company, shipped large quantities of ore to a smelter receiving $5630.66 from the proceeds thereof; That Defendants in error were entitled to at least the sum of $3131.66 thereof, or the said sum less $12 per ton and shipping charges, viz: $3131.66; but that Defendants in error had only been paid $204

and some cents on the amount due as aforesaid; that on or about April 15, 1904, Ferguson and his associates procured the organization of Plaintiff in error and caused the assignment of said contract to it by said Ferguson and his associates with the knowledge that the London-Glasglow Development Company was indebted as aforesaid without making provision for the payment of said sum to Defendants in error, well knowing that thereby the London-Glasglow Development Company would part with all of its assets and be unable to pay Defendants in error their said indebtedness; that on May 31, 1904, Plaintiff in error "in pursuance of the terms of said contract" shipped 71 tons of ore from said mines to a smelter in two shipments, and on June 6, 1905, received from said smelter $7632.18 as the net proceeds thereof; that after the deduction of smelter, railroad charges, sacking, sorting, and hauling said ores, there remained on said June 6, 1905, in the hands of Plaintiff in error for deposit to the credit of Defendants in error as provided in the modification of the original contract and in the escrow instructions, the sum of $7277.78; that on June 11, 1905, there was on deposit in the First National Bank of Nogales, to the credit of Plaintiff in error the sum of $7322.02, all of which, or part of which was the proceeds of the disposition of the said 71 tons of ore shipped as aforesaid; that Plaintiff in error wrongfully and in violation of its contract and without excuse was withholding the payment of said money to Defendants in error; that Plaintiff in error was then largely indebted and had no money or resources, and on said 11th day of June, 1905, had drawn and issued his check upon said funds belonging to Defendants in error as aforesaid in said bank and said checks were presented on the 13th day of June, 1905; that said Ferguson and his associates and Plaintiff in error intended, as defendants in error were informed and believed, to

convert said Seven Thousand odd dollars of Defendants in Error's to the uses of themselves, and that Defendants in error did on the 11th day of June, 1905, institute an action against the Plaintiff in error in the District Court of Santa Cruz County and did garnish the said sum of money so on deposit in said bank and did obtain a preliminary injunction restraining Plaintiff in error from shipping any further ores from said Defendants in error's mines; that said preliminary injunctions were dissolved upon the hearing of a demurrer of the Plaintiff in error, in said action, which demurrer was upon the ground of Improper Joinder of parties defendant; that Defendants in error, the plaintiffs in said action, thereupon amended their complaint; on April 22, 1905, judgment was entered in said action in favor of Defendants in error and against Plaintiffs in error for the sum of $6425.78, being an amount less than the amount prayed for in said action; that, in said action, it was also decreed that Defendants in error were not entitled to the injunction prayed for; that Defendants in error did, in said action, appeal to the Supreme Court of Arizona, from those portions of said judgment decreeing that Defendants in error were not entitled to an injunction and decreeing to Defendants in error a less sum than that prayed for; that Plaintiff in error also appealed from said judgment in said action; that both appeals were still pending in the Supreme Court of Arizona; that subsequent to the commencement of said action and before Defendant in error, Powers, took forcible possession of said mines, Plaintiff in error was entirely insolvent and was conducting work upon said mines in an unworkmanlike and improper manner, to the great detriment of said mines, suffering water to arise in and cave portions of said mines; that by said acts of negligence and its insolvency, said mines were threatened with destruction, damage and detriment; that many suits had

been instituted against Plaintiff in error by laborers and others, to which Plaintiff in error had no defense, and upon which judgments were being entered, and which judgments were still outstanding and unpaid; that, in said actions, judgments were being levied upon the machinery and property of Plaintiff in error at the mines and upon the ores of Defendants in error; that said judgments and levies were in force and effect at the time that it is alleged that Defendants in error, by force and arms, ousted Plaintiff in error from said mines; that said attachments have never been released, and the possession by the sheriff of said machinery and improvements never been disturbed or contested by Plaintiff in error; that if Defendants in error had permitted Plaintiff in error to retain control of the mines, they would, for said reasons, have been greatly damaged and Defendants in error would have incurred heavy and serious loss with no possibility of redress. (*Trans. P. 13-17, Fols. 26-35.*)

To this Answer, Plaintiff in error filed a reply, denying each and every allegation contained in said Answer except those expressly admitted or alleged in Plaintiff in error's Complaint or in said Reply.

The material parts in said reply are as follows: Plaintiff in error denied that there was on the 6th day of June, 1905, or any other time, or at all, in the hands of Plaintiff in error for deposit to the credit of Defendants in error or either thereof, any greater sum than the sum of $6426.78; denies that Plaintiff in error wrongfully or in violation of any contract, retained or was retaining, or keeping any sum of money to which it was not entitled; alleges that on or about the 11th day of June, 1904, it had deposited in said First National Bank of Nogales, to its credit a sum in excess of $6426.78; that on or about June 20, 1904, it would have been Plaintiff in

error's duty under its contract with Defendants in error, to deposit with said Arizona National Bank of Tucson, to the credit of said Defendants in error, $6426.78; that it was not the duty of Plaintiff in error to deposit such money in said bank at any time previous to said 20th day of June, 1904; that on the 11th day of June, 1904, Defendants in error in said suit referred to and described in the complaint herein, and in said action, caused said money in said First National Bank of Nogales, together with all other money and personal property of the Plaintiff in error in the Territory of Arizona, to be garnished and attached, and caused injunctions to be served upon Plaintiff in error restraining it from shipping any ores from said mines and did each and every and all said things, wrongfully and unlawfully, with the purpose and object of endeavoring to break the contracts that Plaintiff in error had with Defendants in error; because it then thought that said contracts were of great value and because Defendants in error realized that the damages that could be recovered by reason of the wrongful acts of Defendants in error in breaking said contracts were very much less than the profits Plaintiff in error could have made under such contract and for the further reason that Defendants in error thought that by instituting said action, and causing said attachments, garnishments and injunctions to issue, they would so cripple and injure the credit and take away the resources of Plaintiff in error that Plaintiff in error would be unable to carry out its said contract with Defendants in error and that Defendants in error would deprive Plaintiff in error by appropriating to their own use, profits exceeding in value Two Hundred Thousand Dollars, which Defendants in error then believed would accrue to Plaintiff in error if Plaintiff in error were permitted to continue with the said contract; that finding that notwithstanding said suit, Plaintiff

in error still endeavored to continue under the terms of said contracts, Defendants in error took forcible possession of said property as aforesaid with intent and object to wrongfully terminate said contracts and deprive Plaintiff in error of the profits thereof.

Thereafter and on April 10, 1906, this reply was amended by Plaintiff in error, the defendant in said case, by the addition of the following allegations: That the case of Frank and Josephine Powers vs. The Worlds Fair Mining Company hereinabove referred to as brought by Defendants in error against Plaintiff in error was on May 25, 1908, regularly tried and judgment entered against said Frank and Josephine Powers and in favor of the Worlds Fair Mining Company; that said judgment quashed, vacated, discharged, and dissolved said attachments and garnishments; that the questions as to the rights of said Defendants in error to sue said Plaintiff in error in said case, and to attach or garnish the property of said Plaintiff in error in said case, and to cause injunctions to issue against Plaintiff in error in said case, and the right of Plaintiff in error and its assignors to retain the said $12 per ton upon ore shipped by it from said Worlds Fair Mine were directly in issue of said case and were each and all decided against said Frank and Josephine Powers, and in favor of said Worlds Fair Mining Company. (*Trans. P. 17-19, Fol. 35-39.*)

The errors assigned in the lower Court and for use in this Court are as follows:

First. Said Supreme Court of the Territory of Arizona erred in entering a judgment affirming the judgment of the District Court of the First Judicial District of the Territory of Arizona, in and for the County of Pima, in entering judgment in favor of Defendants in Error, and against Plaintiff

in error and costs of suit, entered on the 25th day of May, 1908.

Second. Said Supreme Court of the Territory of Arizona, erred in not reversing the said judgment of the District Court of the First Judicial District of the Territory of Arizona, in and for the County of Pima, aforesaid, and in not remanding said cause to said District Court for a new trial.

Third. The Supreme Court erred in not reversing the judgment of the District Court, for the reason that the District Court erred in instructing the jury to render a verdict in favor of the defendants, for the reason that the complaint stated a good cause of action, and the allegatiom of the complaint was supported by evidence which was admitted, and was corroborated by evidence which was wrongfully excluded.

Fourth. The Supreme Court erred in not reversing the judgment of the District Court, for the reason that the District Court erred in refusing to permit plaintiff to introduce the papers and records of the case entitled, Frank and Josephine Powers vs. The Worlds Fair Mining Company, for the reason that it was the best evidence to sustain certain of the allegations of the complaint that the defendants had harassed, impeded, and defeated plaintiffs in their efforts to perform a contract.

Fifth. The Supreme Court erred in not reversing the judgment of the District Court, for the reason that the District Court erred in refusing to permit plaintiff to prove that the defendants had received and retained Seven Thousand odd dollars (proceeds of ore shipped), which money had been deposited in the Nogales Bank and garnished by defendants for the reasons that the *payment* on the part of plaintiff to pay said money to the Tucson bank was one of the breaches of the contract relied

upon by defendant as a defense to this action, and for the further reason that in handling and shipping of the ore in question, and receiving the proceeds thereof plaintiff was but the agent of defendants, and the admission of *his* testimony would have shown that defendants (by reason of the garnishment proceedings) had received this money long prior to the date when it would become due, and for the further reason that the payment by plaintiff of the proceeds of the ore in question into the Arizona National Bank of Tucson, Arizona, was not either by the contract or the pleadings in the case made a condition precedent to plaintiff's right of recovery.

Sixth. The Supreme Court erred in not reversing the judgment of the District Court, for the reason that the District Court erred in refusing to permit plaintiff to prove that it had made all arrangements necessary for it to obtain money with which to carry on the contract, for the reason that the answers set up plaintiff's alleged insolvency and inability to pay its debts and expenses of carrying on the contract.

Seventh. The Supreme Court erred in not reversing the judgment of the District Court, for the reason that the District Court erred in not permitting plaintiff to prove that plaintiff had good reason not to bring any money and resources into the Territory, for fear defendants would attach and garnish it, because the inability of plaintiff to bring money into the Territory and use it freely aided in preventing plaintiff from carrying out the contract.

Eighth. The Supreme Court erred in not reversing the judgment of the District Court, for the reason that the District Court erred in not permitting witness Webber to testify as to the value of the contract, for the reason that Webber had testified that he knew the value thereof, and the value of

the contract was one of the material issues involved in the litigation.

Ninth. The Supreme Court erred in rendering judgment against the plaintiff in error, and in favor of said defendant in error, for costs of suit in said Supreme Court.

Believing however that the assignments can be more clearly and better expressed, plaintiff in error asks leave to change their language and rearrange them, assigning the following assignments of error for the purposes of this brief.

ASSIGNMENTS OF ERROR

First. The Supreme Court of the Territory of Arizona erred in entering judgment affirming the judgment of the District Court of the First Judicial District of the Territory of Arizona, in and for the County of Pima, in entering judgment in favor of Defendants in error and against Plaintiff in error and costs of suit on the 25th of May, 1908.

Second. The Supreme Court of Arizona erred in not reversing the said judgment of said District Court of the First Judicial District of the Territory of Arizona, in and for the County of Pima aforesaid, and in not remanding said cause to said District Court for a new trial.

Third. The lower Court erred in instructing the jury as follows: "Gentlemen of the jury: There has been a motion made that the Court direct a verdict for the Defendant, and under the view the Court takes of the law and the pleadings in this case, I feel compelled to comply with the request and grant the motion. Therefore, I direct, as a matter of law under the pleadings in this case,

that the plaintiff has not proven by his case, and therefore, direct you to return a verdict for the defendants. Mr. Barclay, you may come around, and sign this verdict as foreman of the jury," for the reason that the complaint stated a good cause of action; all of its allegations were supported by evidence which was admitted, and were corroborated by evidence wrongfully excluded by the Court; and the Supreme Court of Arizona erred in not reversing the judgment of the lower Court for the same reasons.

Fourth. The lower Court erred in instructing the jury as set out in Assignment Number Three, for said instruction was given on the theory that the evidence disclosed that there was a condition precedent in the contract; that this condition had not been pleaded by Plaintiff in error; and neither performance thereof nor excuse for nonperformance had been pleaded; For the reason that there was no such condition precedent; the condition referred to was fully pleaded; excuse for performance was alleged, and the condition was satisfied, discharged and waived. For the same reasons the Supreme Court of Arizona erred in not reversing the case.

Fifth. The Supreme Court of Arizona erred in not reversing the judgment of the District Court for the reason that the District Court erred in refusing to permit Plaintiff in error to introduce in evidence papers and records of the case entitled Frank and Josephine Powers vs. The Worlds Fair Mining Company. The introduction of said papers and records was sought for the purpose of proving that the said case was wrongfully, unlawfully and upon false and untruthful affidavits instituted and maintained by Defendants in error against Plaintiff in error for the purpose of impeding, harassing and defeating Plaintiff in its efforts to carry out the terms of the said contract, and that by means of

garnishments, attachments and injunctions caused to be served in said case by Defendants in error, Plaintiff in error was annoyed, harassed, impeded and defeated in its efforts to carry out its contract with Defendants in error. That the refusal of the lower Court to permit such evidence to be introduced was error for the reason that such records and papers were competent evidence and were the best evidence to sustain the allegations of the complaint with respect to those facts.

Sixth. The Supreme Court erred in not reversing the judgment of the District Court for the reason that the District Court erred in not permitting Plaintiff in error to prove that Defendants in error had received and retained Seven Thousand odd dollars, (the proceeds of ore shipped,) which money had been deposited in the bank at which Plaintiff in error did its business and there garnished by defendants in error in the suit of the Defendants in error against Plaintiff in error and which money was subsequently paid Defendants in error through the medium of said garnishment suit, as such evidence if admitted would have proved the payment to Defendants in error of all moneys received from ores shipped before the time it should have been paid Defendants in error by Plaintiff in error under the terms of the contract or under the terms of any agreement or understanding between Plaintiff in error and Defendants in error, thereby satisfying in full all conditions of the contract on the part of Plaintiff in error up to the time it was forcibly dispossessed of the property by Defendants in error, the Supreme Court of Arizona having held that the evidence showed that this payment was a condition precedent not performed by Plaintiff in error.

And for the further reason that the evidence further showed in connection with the exclusion of the papers and records of the case of Defendants

in error against Plaintiff in error that in handling and shipping the ore in question and in receiving the proceeds thereof, Plaintiff in error was but the agent of Defendants in error, having no right, title or interest in the portion of the proceeds of said ore to which Defendants in error were entitled, other than the possession thereof for a limited time and that such possession was taken from Plaintiff in error by Defendants in error long before Defendants in error were entitled to the possession thereof.

Seventh. The Supreme Court erred in not reversing the judgment of the District Court for the reason that the District Court erred in refusing to permit Plaintiff in error to prove by its witness Dr. T. A. Stewart, that it had made all necessary arrangements for money with which to carry on and complete the contract. For the reason that the Answer of Defendants in error alleged that Plaintiff in error was insolvent and unable to pay its debts and expenses of carrying on the contract and was unable to carry on the contract, and in consequence the property of Defendants in error was suffering and would suffer damage and loss.

Eighth. The Supreme Court erred in not reversing the judgment of the District Court for the reason that the District Court erred in not permitting Plaintiff in error to prove that it was prevented from bringing any money and resources into the Territory of Arizona by fear of and on account of threats by Defendants in error to attach and garnish any such money and resources and thereby Plaintiff in error was prevented from carrying on its obligations under the said contract.

Ninth. The Supreme Court erred in not reversing the judgment of the District Court for the reason that the District Court ererd in not permit-

ting Plaintiff in error's witness, Webber, to testify as to the value of the contract. For the reason that Webber testified that he knew the value thereof; the value of the contract being one of the material issues involved in the litigation.

Tenth. The Supreme Court erred in rendering judgment against Plaintiff in error and in favor of Defendant in error for costs of suit in said Supreme Court.

ARGUMENT

"The giving, refusing, or modifying of instructions, and every part of the charge given to the jury, and all rulings, orders, and actions to the Court in a case shall be deemed excepted to without formal exception, and subject to revision by the Supreme Court, for error, without bill of exception.

Every document and other object filed in a case shall constitute a part of the record thereof. All documents and objects offered in evidence, whether admitted or rejected, shall be marked appropriately as exhibits or for identification, and filed in the case. Either party to a suit may make the oral testimony and proceedings in a case, together with such rulings, orders, or other action of the Court in the case, as do not appear otherwise of record a part of the record in the case by filing therein either a statement of facts or a transcript of the Court Reporter's notes, as provided hereinafter." (*Laws of Arizona, year 1907, page 125, Chap. 74.*)

Following these provisions of the laws of Arizona are provisions for the detail work of making up the statement of facts or transcript of record.

The different steps required by the Statutes of Arizona to make the transcript of the Court Reporter's notes as well as all other papers filed, parts of the records herein, were duly taken. And exceptions to the rulings of the Court during the trial were expressly taken and made a part of the record. (*Trans. P. ——, Fol. ——.—*

FIRST AND SECOND ASSIGNMENTS OF ERROR

As these assignments will necessarily be argued and the assignments following, no special argument is made upon either of them at this time.

THIRD ASSIGNMENT OF ERROR

The bare statement of the case hereinbefore given so fully supports this assignment of error that we feel it unnecessary to argue it. The Supreme Court of Arizona expressly declared that Plaintiff in error would have suffered damage from a breach of the contract and would be entitled to damages if it were not for the fact that it had not pleaded the condition precedent referred to in the next assignment of error and had not pleaded its performance or an excuse for nonperformance. (*Trans. P. 70, Fol. 147-148.*)

FOURTH ASSIGNMENT OF ERROR

While the lower Court gave as grounds for the instruction which it gave to the jury those referred to in the third assignment of error it is more than probable that its real grounds were those given by the Supreme Court of Arizona in upholding the judgment of the lower Court. The Supreme Court

of Arizona so interpreted the contract between Plaintiff in error and Defendant in error that a payment by Plaintiff in error to Defendants in error's credit at the Arizona National Bank of Tucson of moneys received by Plaintiff in error from shipments of ore as provided for in the escrow instructions was a condition precedent in the contract; declared that the evidence showed that ore was shipped under the conditions of the contract; that a large part of the proceeds thereof should have been deposited by Plaintiff in error to the credit of Defendants in error in said bank on or before June 20, 1904, and the evidence not showing that such money was so deposited and Plaintiff in error not having alleged the performance of this condition precedent, nor any excuse for not performing it, could not give evidence to show its performance or excuse for nonperformance, for which reason the Supreme Court held that the lower Court was justified in excluding the evidence excluded by it, and that Plaintiff in error having been guilty of the first breach could not hold Defendants in error responsible for their later breach.

THE PLEADINGS FULLY ALLEGE THOSE CONDITIONS OF THE CONTRACT THAT THE ARIZONA COURTS CONSTRUED INTO A CONDITION PRECEDENT, FULLY ALLEGE NONPERFORMANCE, AND FULLY ALLEGE EXCUSES FOR NONPERFORMANCE ON THE PART OF THE PLAINTIFF IN ERROR.

We believe that the allegations of the complaint in themselves are sufficient to sustain the above declaration, but it does not seem necessary to argue that question for even if the complaint does not contain the necessary allegations the Answer does. Under the rule generally recognized

in the State and Federal Courts of the United States, the allegations of an Answer may supply any omitted allegations in the complaint, and thus aided, the defect in the complaint is cured.

The Statutes of Arizona provide, "In pleading the performance of a condition precedent in a contract, it shall not be necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part, and if such allegation be controverted, the party pleading shall establish on the trial the facts showing such performance." *Revised Statutes of Arizona, 1901, P. 427, Par. 1283.* Under this Statute a plaintiff need only to allege, formally, that he performed the conditions precedent in a contract. No greater particularity and no allegation of fact can be required of him, either describing any particular condition or giving any facts showing the alleged performance. Such allegation was not intended by the Statute to give the opposite party any information as to the evidence or proof that would be made on the trial, and would require no evidence or proof unless the opposite party should deny the allegation. As it could not be attacked for indefiniteness, uncertainty, or insufficiency, its only object could be to require the plaintiff to assume the burden of proof, if the defendant chose to take issue on that question. It was merely a formal allegation tendering an issue of fact to the defendant. The system of code pleading in force in Arizona was taken from Texas, first in the year 1887, (*Revised Statutes of Arizona, 1887, Pages 165-175, Paragraphs 649-745*) and afterwards re-enacted in the Revised Statutes of Arizona 1901 (*Pages 426-443, Paragraphs 1271-1372*) and largely the provisions of the Arizona Statutes in this respect were copied from Texas word for word. (*Sayles, Texas Civil Statutes, Vol. 1, Pages 415-477, Art's 1177-1269*). As early as the year 1849, the Supreme

Court of Texas quoted with approval from a decision of the Supreme Court of New York as follows: "The rule is as stated by Gould in his Treatise upon Pleading (*Chap. 3, Sec. 192*). If party expressly avers or confesses a material fact omitted on the other side, the omission is cured. It may thus be made to appear, from the pleadings, on both sides, that the plaintiff is entitled to the judgment although his own pleadings, taken by itself is insufficient", and this rule has ever since been followed by the Texas Courts.

Hill vs. George. 5 Texas. 87.
McFarland vs. Mooring 56 Texas. 118.
International & G. N. R. Co. vs. Sein et al (Tex.) 33 S. W. Rep., Page 558.

This Honorable Court has declared, "For it is a settled rule founded in good sense and supported by the settled doctrines of pleading that many defects are waived and cured by pleading over, that might have been fatal on demurrer."

The United States vs. Morris, 10th Wheat. 246-283.
Book 6 L. ed., Page 314, 322-3.

The rule seems to be general in the State and Federal Courts of the United States that "If a necessary allegation is omitted from a pleading and the missing allegation is either alleged or admitted by the pleading of the adverse party, the defect is cured."

Cyc. Vol. 31, P. 714-17.

The condition of the contract that the Arizona Courts held was a condition precedent, was that Plaintiff in error should pay a certain part of the money received by it, from shipments of ore, to the

Arizona National Bank of Tucson, Arizona, for the credit of Defendants in error. No time was fixed in the contract for this payment, and fifteen (15) days after its receipt by Plaintiff in error was fixed by the escrow instructions. The answer alleged the shipment of ores under the contract; the receipt by Plaintiff in error on June 6, 1904, of the proceeds of such ore so shipped; that the amount thereof to which the Defendants in error were entitled, was, on June 11, 1904, due Defendants in error; that on said June 11, 1904, plaintiff in error had not paid the same but wrongfully and in violation of said contract and without excuse was keeping and retaining the same; that plaintiff in error was then largely in debt and had no money or resources; that on said June 11, 1904, defendants in error commenced suit against plaintiffs in error for such sums so due, and garnished the money received from the said shipments of ores, which were then on deposit in the bank at Nogales, Arizona, and obtained an injunction restraining plaintiffs in error from shipping any further ores from the mines. Defendants in error further alleged that subsequent to the commencement of said action and prior to the time when defendants in error took possession of the mines from plaintiff in error, the latter was entirely insolvent. (*Paragraphs 5, 6, 7 and 8 of Amended Answer, Trans. P. 14-17.*)

The complaint alleges that on said June 11, 1904, plaintiff in error was in possession of the mines, improvements, and other property thereon, and certain ores in process of shipment therefrom, under and by the terms of said contract; was working, developing and mining said mines, shipping ores therefrom under its said contracts, and generally carrying on the business for which it was formed and which it was authorized and entitled to carry on under the terms of said contracts, when defendants in error brought said suit referred to in the answer, and

fully described in the complaint, and caused attachments and garnishments in said suit to be levied upon all the assets of plaintiff in error in Arizona, including all moneys being more than Seven Thousand Dollars that it had in the said Nogales bank and excepting its machinery, developments and improvements at said mines; caused injunctions in said case to be served on plaintiff in error commanding it to refrain from shipping any ores from said mines; that defendants in error have ever since maintained said attachments and garnishments, and prevented plaintiff in error from bringing other assets into Arizona by threats to garnish and attach them; that defendants in error continued to harass, impede, and *defeat* plaintiff in error's efforts to carry out the terms of said contracts; that at the time said suit was brought and said writs were levied and served and said threats made, plaintiff in error was not indebted to defendants in error; that the said suit and the attachments and other writs were wrongfully and unlawfully instituted, levied and served; that they were instituted and procured by means of sworn affidavits falsely alleging material facts with the object and intent of breaking and abrogating said contracts, and to unlawfully harass and annoy plaintiff in error and prevent it from performing the contract; that thereby defendants in error interfered with and very much crippled and impeded plaintiff in error in its efforts to perform, under said contracts; and that finally on July 25, 1904, defendants in error wrongfully and unlawfully took forcible possession of said mines and improvements etc. thereon, driving plaintiffs in error therefrom and depriving plaintiff in error of every asset it possessed in Arizona, which condition of affairs generally continued until the commencement of this action. The complaint also alleged that the use, occupation and possession of said mines, improvements, etc. were essential to

enable plaintiff in error to perform under the contract. (*Complaint Trans. P. 4-8.*)

Thus the allegations of the complaint, at least aided by the allegations of the answer, not only met the requirements of law, but were redundant with facts setting forth the alleged condition precedent, plaintiffs in error's failure to perform it, and the latter's excuses for not so performing.

While the answer alleges that performance should have been made before June 11, 1904, the complaint, by unmistakable inference at least, takes issue on that point. Plaintiff in error's reply to said answer in express terms takes issue on the point and alleges that June 20, 1904 was the date of performance. The reply went fully into the question above referred to.

The reply as a pleading on the part of plaintiff is especially authorized by the Statutes of Arizona.

Revised Statutes of Arizona, 1901, P. 440, Par. 1357.

It may not be amiss at this time to explain that when on the trial of this case objections to the introduction of evidence was, on the suggestion of the Court, made on the grounds that neither performance nor excuse for nonperformance was pleaded, the rule obtained in Arizona that, an amendment of the complaint in a material matter was, in so far as the Statutes of Limitations was concerned, equivalent to the commencement of a new action, and the Statutes of Limitations having run plaintiff in error believed it more dangerous to amend than to appeal. Long after the trial of the case and on March 27, 1911, some two years after the rendition of judgment in this case by the Supreme Court of Arizona, the said Supreme Court in a well considered case modifying its former rulings declared, "To permit the

use of the technical law of pleading, formulated to facilitate trials and to render more certain the administration of justice, to defeat a hearing and determination of what is justice, is wholly inconsistent with the spirit and policy of our law, which seeks a determination of every case upon a trial of the merits."

Boudreauz vs. Tucson Gas E L & P. Co. (Ariz.) 114 Pac. P. 547, 552-3.

This declaration of the Court was no doubt in recognition of the general policy of the laws of pleading of Arizona and more especially of that Statute declaring "The Court shall in every stage of an action disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect."

Revised Statutes of Arizona, 1901, P. 428, Par. 1293.

The reply of plaintiff in error to the answer made even more definite and clear the allegations in respect to the so-called condition precedent. It in addition and by amendment shortly before the trial set up and alleged the final determination upon all the material issues of the case of Powers and wife vs. The Worlds Fair Mining Company in favor of the latter.

Again, the rule is everywhere recognized in the State and Federal Courts of the United States that pleadings will be construed most favorably towards the pleader in determining whether or not the allegations therein contained are sufficient to apprise the opposite party of the questions of fact that the pleader will seek to establish on the trial.

Ency. of P. & P. Vol. 4, P. 756.

United States vs. Parker, 120 U. S., P. 89-97, Book 30 L. ed., Page 601.

An even greater liberality is allowed after answer filed and on trial.

Ency. of P. & P., Vol. 4, P. 758.

No technical language is needed in pleading in Arizona. "The pleading shall consist of a concise statement of the facts constituting plaintiff's cause of action or the defendant's grounds of defense."

Revised Statutes of Arizona, 1901, P. 427, Par. 1277.

The contract in this case required the organization of a corporation to operate and work the said mining properties (*Transcript of Record, Page 9, Folio 18*). Defendant in error, Frank Powers, testified, "I know that the Worlds Fair Mining Company was formed for the purpose of taking over the contract." He participated in the organization and was elected one of its directors (*Transcript of Record, Page 28, Folio 59*). The complaint alleges that at the time the garnishments etc. were served, Plaintiff in error "was working, developing and mining said mines and shipping ores therefrom under its said contracts and generally carrying on the business for which it was formed and which it was authorized and entitled to carry on under the terms of said contracts;" (*Transcript of Record, Page 4, Folio 7*). This allegation of the complaint in the light of the said evidence must be construed to be a general allegation of performance up to the time of the garnishments, etc. On motion or demurrer the allegations could have been made more specific if Defendants in error had so required.

The allegation in the complaint that all the property of Plaintiff in error in the Territory of Arizona had been garnished and attached and the further allegations that Plaintiff in error was prevented from bringing other property or assets into the Territory to perform under the contract by the

threats of Defendant in error to attach and garnish it in connection with the other allegations of similar nature could surely convey no other impression than that Plaintiff in error could pay no money to anyone, much less its money in bank intended for that purpose, after the service of garnishments and attachments, and that Plaintiff in error's inability to perform was caused by the acts of Defendants in error, and further that this condition existed for years thereafter. We feel that we are justified therefore in asserting that the complaints did allege performance generally till attachments and garnishments were served, and did allege that after that time Defendants in error made further performance impossible, setting out the reasons why such performance was impossible.

THE PROVISIONS OF THE CONTRACT RELATING TO THE DEPOSITING OF PROCEEDS OF SHIPMENTS OF ORE NEED NOT BE SPECIALLY PLEADED, BECAUSE THEY WERE EITHER INDEPENDENT CONDITIONS OR CONDITIONS SUBSEQUENT.

A certain estate had vested in Plaintiff in error, viz: The right to possession of the mines under a contract of sale. This right was to continue for a definite time unless terminated by certain failures on the part of the Plaintiff in error to perform conditions contained in the contract of sale. These conditions were stated in the contract and were as follows: A failure to commence work in ninety days and a failure to do two feet of work per day thereafter. Both of these conditions were complied with till Defendants in error on July 25, 1904, took forcible possession of the mines. If the provisions of the contract and the escrow agreement relating to the depositing of the proceeds of the ores

shipped, were conditions upon which Plaintiff in error's right to the possession of the mines and right to work the same depended, then a failure to perform them would give to Defendants in error a right to terminate the vested interest in the property theretofore enjoyed by Plaintiff in error. The distinction between a condition precedent and a condition subsequent is too well settled to cite authority. Generally speaking, a condition precedent is one that must be performed before an estate vests while a condition subsequent is one that operates to terminate an estate already vested. In this case, the contract was not a contract for an option. In express terms it was an agreement to sell the mines and in express terms it provided conditions subsequent upon which the right to purchase should terminate. A condition which was not in express terms declared to be either a condition precedent or subsequent was contained in the contract and ambiguous language in it was made more definite and certain by the language of another document not executed as a modification of the contract. This last condition, like the other conditions could only operate to terminate rights already existing and enjoyed. It therefore could be nothing more than a condition subsequent under any construction of the contract, and must be pleaded by the defendant in error and not by plaintiff in error.

PAYMENTS TO THE CREDIT OF DEFENDANTS IN ERROR FOR ORE SHIPPED WERE NOT CONDITIONS PRECEDENT TO THE CONTRACT NOR TO ANY RIGHTS THEREUNDER, FOR THE FOLLOWING REASONS. (1) THE CONTRACT DID NOT MAKE SUCH PAYMENTS A CONDITION PRECEDENT. (2) NONE OF THE PARTIES TO THE CONTRACT INTENDED ITS TERMS IN RELATION THERETO SHOULD BE A CONDITION PRECEDENT AND NEVER AFTERWARDS CONSIDERED THEM AS SUCH. (3) THE ESCROW INSTRUCTIONS OF APRIL 15, 1904, WERE NOT A MODIFICATION OR AMENDMENT OF THE ORIGINAL CONTRACT OR INTENDED AS SUCH. THE SAID ESCROW INSTRUCTIONS PRESCRIBED NO PENALTY EXCEPT THE DESTRUCTION OF DEEDS DEPOSITED IN ESCROW FOR A FAILURE TO PERFORM THE CONDITIONS OF THE ESCROW. NO PENALTY COULD BE CLAIMED OR ENFORCED UNDER THE TERMS OF THE ESCROW INSTRUCTIONS UNTIL DEFENDANTS IN ERROR HAD DONE CERTAIN THINGS THAT WERE NEVER ALLEGED TO HAVE BEEN DONE NOR PROVED TO HAVE BEEN DONE.

(1) The Contract Did Not Make Such Payments a Condition Precedent.

Generally speaking the objects sought by the contracts were three. First, the sale and purchase of the mines. Second, the working and development of the mines. Third, the extraction and shipment of ore under a royalty. The two latter of these were incidental to the first. It was expressly covenanted that the sale of the mines was conditional upon the doing of certain work and development, and the failure to do this development work was the sole condition named in the original contract giving to defendants in error a right to terminate the contract. The contract contained provisions relating to the disposition of the proceeds of the ore, but did not provide any definite time in which such disposi-

tion of said proceeds should be made, and did not provide any penalty for a failure to make them. The setting forth in the contract of those failures to perform which would justify a termination of the contract, negatived any claims that a failure to perform any of the other conditions of the contract would authorize the aggrieved party to terminate it. The rule "*Expressio unius est exclusio alterius*", as applied to contracts, has been recognized and adopted in this court.

Douglas vs. Lewis, 131 U. S. 75; Book 33 L. ed. 53.

> "Upon general principles, applicable to the construction of written insrtuments, the enumeration of certain powers with respect to a particular subject matter is a negation of all other analogous powers with respect to the same subject matter. *Ex parte McCardle, 7 Wall, 506; 19 L. ed. 264. Endlich Interpretation of Statutes, Par. 397, 400.* As observed by Lord Denman in *Aspdin vs. Austin, 5. Q. B. 671-684*, 'Where parties have entered into written engagements, with express stipulations, it is manifestly not desirable to extend them by any implications; the presumption is that, having expressed some, they have expressed all the conditions by which they intend to be bound, under that instrument.' The rule is curtly stated in the familiar legal maxim, "*Expressio unius est exclusio alterius.*"

Tucker vs. Alexandroff, 183 U. S., 424-436, Book 46 L. ed., 264-270.

The main object of the contract as aforesaid was the sale by the Defendants in error and the purchase by Plaintiff in error of the mines. The purchase price was not required to be paid until one

thousand feet of work had been done. Incidental to this main purpose, the contract provided that plaintiff in error should commence work in ninety days and should continue to do this one thousand feet of work at the rate of not less than two feet per day. These were the two important provisions in the contract; and the failure to pay the purchase price at the time stated; the failure to commence work in ninety days and the failure to prosecute the work at the rate stated were each made grounds for, and were the only grounds stated for, terminating the contract. (It was admitted on the trial that the conditions of the contract relating to the work had been performed up to the time defendants in error took forcible possesssion of the mines. (*Trans. P. 32, Fol. 67*). The provisions of the contract relating to the shipments of ore were undoubtedly intended to provide for the equitable disposition of the proceeds of such ore. Plaintiff in error paid the expense of extracting the ore, defendants in error furnished the ore, the expenses of shipping and reduction was deducted from the proceeds, and these net returns were paid to defendants in error, to apply upon the purchase price of the mines. Nothing was stated in either the original contract, or the amendment to it, relative to the time when these payments should be made, and these contracts, neither expressly or by inference made such payments precedent to anything, or any rights of plaintiff in error under the contract. The utmost that can be said in that regard is that the parties to the contract intended, that when money was received by plaintiff in error from ores shipped, the latter should in a reasonable time ascertain the amounts it should, under the contract, deduct therefrom, and should within a resonable time thereafter deposit the balance to the credit of defendants in error in the said Tucson bank. There was nothing in the contract express or implied denying plaintiff in

error the right to keep on fulfilling each and all the other terms of the contract or denying the latter's right to enjoy all its benefits thereunder pending the making of such deposit. As the matter was of such secondary importance that the contract did not even require the payments to be made in a reasonable time after the receipt of the money by plaintiff in error, it cannot be said that the contract, in itself, provided any date for performance. The contract, did, however, under penalty of forfeiture provide that two feet per day or fifty feet per month of work should be done. To hold that the deposit of the money received from ore was a condition precedent to doing this work, would be an absurdity, for it would be holding that the deposit in the distant Tucson bank was required by the terms of the contract to be made practically the same day it was received by plaintiff in error. To hold that these provisions were a condition precedent to the shipment of other ores would be almost as absurd, and is contradicted by the custom that had grown up under the contract of making shipments as sufficient ore was gathered and irrespective of when the proceeds were paid or deposited. (*Trans. P. 54, Fol. 112-3*). And the express language of the contract, required the shipment of ores extracted and certain other ores on the dump; that they be converted into money as soon as that could reasonably be done, and the money applied upon the purchase price. It can hardly be held that the direct language of a contract can be contradicted by an inference drawn from the contract.

Before the deeds made by the defendants in error and deposited in escrow were, under the terms of the contract, to be delivered, and before plaintiff in error could throw up the contract, such deposits or payments would under a reasonable construction of the contract, have to be made. At the time the money from the particular shipment of ores herein

discussed, was received by plaintiff in error, the only obligations under the contract resting upon plaintiff in error were those requiring the doing of two feet of work per day or fifty feet per month and the continuous shipment of ores extracted or ready for shipment. The only obligation resting upon defendants in error was to permit the delivery of the deeds when the purchase price was paid. To what one of these conditions of the contract, then, was the payment or the deposit of moneys received from ores shipped, a condition precedent? If to any, to the latter only, and then not by the direct language of the contract, but by reasonable inference from its language. This view is not only the reasonable one but was the one undoubtedly held by the parties to the contract, for on April 4, 1904, when the differences between the contracting parties were adjusted, and the contract was amended, and the escrow instruction was executed, two things at least were determined. One, that fifteen days after the receipt of proceeds of ore shipped was a reasonable time within which their proceeds should be deposited to the credit of defendants in error. The other was that if plaintiff in error failed to make any of the said deposits in such time, defendants in error upon having that fact determined in the manner stated in the escrow instructions, could withdraw the deeds to the mines from escrow.

The putting of these deeds in escrow was an important and an expressed condition in the contract.

On April 4, 1904, the defendants in error had not put the deeds in escrow, and each side making concessions, it was agreed that the *contract* should be amended as was done, and that the deeds should be deposited in escrow not subject to any of the conditions stated in the contract but subject to certain conditions stated in the escrow instructions.

It was stated in the escrow instructions that the penalty for the failure of plaintiff in error to pay in fifteen days after their receipt by plaintiff in error of money received from shipments of ore, was the withdrawal of the deeds from escrow. Under the general rule laid down in the authorities hereinabove quoted, it cannot be contended that any other penalty than that prescribed in the escrow instructions could be invoked. There was nothing in the contract or escrow instructions to justify the Court reading into the escrow instructions a new, different or greater penalty than the parties had expressly agreed upon, or to make it a condition precedent to anything in the contract.

This Court has laid down the rule:

> "The general principles in respect of conditions precedent are set forth sufficiently for the purposes of this case by Chief Justice Shaw in *Proprietors of Mill Dam Foundry vs. Hovey, 21 Pick. 440,* cited by appellant. Where the undertaking on one side is in terms a condition to the stipulation on the other, that is, where the contract provides for the performance of some act, or the happening of some event, and the obligations of the contract are made to depend on such performance or happening, the conditions are conditions precedent. The reason and sense of the contemplated transaction, as it must have been understood by the parties and is to be collected from the whole contract, determine whether this is so or not; or it may be determined from the nature of the acts to be done and the order in which they must necessarily precede and follow each other in the progress of performance. But when the act of one is not necessary

> to the act of the other, though it would be convenient, useful, or beneficial, yet as the want of it does not prevent performance, and the loss and inconvenience can be compensated in damages, performance of the one is not a condition precedent to the performance by the other. The non-performance on one side must go to the entire substance of the contract and to the whole consideration, so that it may safely be inferred as to the intent and just construction of the contract that if the act to be performed on the one side is not done, there is no consideration for the stipulation on the other side. *See Cutter v. Powell, 2 Smith, Lead. cas. (7th Am. ed.) 17, and notes.*"
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> *New Orleans v. Texas & P. Ry. Co., 171 U. S. 334; Book 43 L. ed., 186.*

(*2*) *None of the parties to the contract intended that its terms in relation thereto should be a condition precedent and never afterwards considered them as such.*

There is no allegation in the pleadings of either plaintiff in error or defendant in error referring to the depositing of money received from sales of ore as a condition precedent. Neither party plead that such deposits were conditions precedent. On the trial of the case defendants in error never objected to the introduction of evidence on the ground of failure on the part of plaintiff in error to alleged performance of the so-called condition precedent, or an excuse for nonperformance, until after the Court had stated that, as a ground for objection. On the trial of the case in May, 1908, defendant in error, Frank Powers, testified that he had never made a claim to The Worlds Fair Mining Company, any of its directors, Mr. Booth, or Dr. Stewart, that

the contract was forfeited. (*Trans. P. 29, Fol. 60-1*). The correspondence between J. W. Booth on behalf of plaintiff in error and Eugene S. Ives on behalf of defendant in error in March, April, and May, 1905, recognizes the fact that the whole contract had not, even at that late date, been terminated. (*Trans. P. 57-64, Fol. 119-133*). In one of these letters written April 13th, 1905, Mr. Ives says, "The lawsuit that I instituted did not strike at the life of the contract. It was merely with respect to the proceeds of the ore shipped. It seems to me that there should be no difficulty in effecting a settlement." (*Trans. P. 62, Fol. 129*). Mr. Ives was expressly authorized by defendants in error to write these letters. (*Trans. P. 55, Fol. 115.*) The record in the case of Powers v. Worlds Fair Mining Company was offered in evidence at the trial by plaintiff in error, the Court on objection excluded it, to which ruling plaintiff in error excepted. This record would have shown that defendants in error sued plaintiff in error, not asking for the abrogation of the contract and the return of the mines, etc., by reason of plaintiff in error's failure to perform any condition of the contract, but asking for a judgment for an alleged debt for the proceeds of ore shipped, and an injunction to restrain plaintiffs in error from shipping other ores under the contract. They did not ask that possession of the mines be restored to them nor that the machinery or improvements placed on the mines by plaintiff in error and his predecessors in interest be forfeited to them under the terms of the contract. The real controversy in the suit was the Twelve Dollars per ton which both claimed, and defendants in error thus sought to secure and to force plaintiff in error to surrender by tying up its assets till it did, a construction of the contract which would deny plaintiff in error the said Twelve Dollars per ton. Finally when this plan seemed about to fail, and on July 25, 1904, defendants in error took forcible pos-

session of the mines. Neither in the case of Powers v. The Worlds Fair Mining Company nor in this case have defendants in error attempted by pleadings or testimony to justify such action under the claim that the failure of plaintiffs in error to perform a condition precedent in the contract, terminated the contract. Surely they needed justification, and would have pleaded the condition if they had thought it a condition precedent. Neither on June 6, 1904, when the money from ores shipped was received, nor on June 11, 1904, when defendants in error commenced suit for the money, nor until July 25, 1904, did defendants in error show any desire or make any attempt to interfere with plaintiff in error in its performance and enjoyment under the contract except in such matters as related to ores shipped, or to be shipped, and the proceeds derived therefrom.

(3) *The escrow instructions of April 15, 1904, were not a modification or amendment of the original contract or intended as such. The siad escrow instructions prescribed no penalty except the destruction of deeds deposited in escrow for a failure to perform the conditions of the escrow. No penalty could be claimed or enforced under the terms of the escrow instruction until defendants in error had done certain things that were never alleged to have been done nor proved to have been done.*

Previous to April 15, 1904, the parties were disagreeing about certain terms of the contract, viz: defendants in error had not deposited their deed in escrow as by the terms of the original contract they had agreed to do, and they were claiming that the London-Glasglow Development Company, the then owner of the contract, was retaining Twelve Dollars per ton from the proceeds of ore shipped, that they were not entitled to. On that date all differences were settled. A document expressly stating that it

modified the contract was executed and that moneys received from the sale of ores to which the London-Glasglow Company was not entitled under the contract should be deposited to the credit of defendants in error in the Arizona National Bank of Tucson, and credited to the plaintiff in error on the purchase price of the mines. No time was even then stated in which such deposit should be made. This modification of the contract was clearly for the benefit of defendants in error. At the same time the escrow instructions to the bank were executed. These instructions did not contain any language, even inferentially, stating that they modified or in any way changed the contract, and the sole penalty they provided for a failure on the part of plaintiff in error, or its predecessors in interest, to perform any of its conditions, was the withdrawal of the deed from escrow. Under the conditions of the escrow instructions, that penalty could not be invoked until defendants in error had taken certain action therein provided for. Such action, so far as the pleadings and evidence in this case shows was never taken by defendants in error, and for all that appears in this case, the deeds are still in escrow under the instructions.

These escrow instructions were plainly for the benefit of plaintiff in error, in that they enabled the latter to get the deeds deposited in escrow. The penalties provided for in said escrow instructions were therefore necessarily to be construed more strongly against defendants in error than against plaintiff in error.

Ency. of U. S. Supreme Court Reports, Vol. 7, P. 264, and Vol. 4, P. 573.

As above argued, the escrow instructions having provided a penalty for defaults, all other penalties were excluded. The original contract already provided penalties for all things considered in the escrow

instruction, except that provided for failure to deposit sums from the sales of ore. The escrow instructions provided penalties for all things penalized in the original contract. The original contract was executed Sept. 4, 1903, and as the escrow instructions were executed April 15, 1904, it must be held, either, that the escrow instructions were not intended to modify the original agreement or that the penalties provided for in the original agreement were superceded by the penalties provided for in the escrow instructions. If the escrow instructions were intended to modify the original contract then there were no penalties or default provided in the original contract and no right to terminate the contract was expressed in either document that had not been abrogated by the escrow instructions. As the defendants in error never performed the conditions precedent set out in the escrow instructions and as they never in this case alleged their performance no penalties for default on the part of plaintiff in error could be claimed under the language of the contract and its modifications. It cannot be seriously claimed, however, that the penalties provided for in the escrow instructions modified or changed the penalties of the original contract or were intended so to do.

The Supreme Court of Arizona has inferentially held that the escrow instructions did not modify or become a part of the original contract.

Powers v. Worlds Fair Mining Company (Ariz) 86 Pac. 15.

In a later decision in the same case, the Supreme Court of Arizona declared, "And the evidence adduced on the part of Powers shows that in signing the escrow instructions it was stated to the other side that he signed the instructions to avoid a lawsuit and further stated that the escrow instructions did not change the contract." * * * * "The ap-

pellant" (Frank and Josephine Powers) "contends that the evidence concerning the circumstances surrounding the execution of the escrow instructions shows that such instructions were not intended to be a modification of the original contract and did not afford a construction by the parties of such contract, since they were signed by Powers with the statement and understanding that such instructions did not affect the contract."

Powers et al v. Worlds Fair Mining Company (Ariz.) 100 Pac. 955. See 956.

"It is a principle recognized and acted upon as a cardinal rule by all Courts of justice, in the construction of contracts, whether under seal or not, that the intention of the parties at the time of making the contract is to be inquired into; and, if not forbidden by law is to be effectuated."

Ency. of U. S. Sup. Court Rep. Vol. 4, P. 570. An authority cited.

"What is implied is as effectual as what is expressed. The intent of the parties as manifested is the contract."

Equitable Ins. Co. v. Hearne 20 Wall. 494, 496. 22 L. ed. 398.

United States v. Babitt 95 U. S. 334, 336, 24 L. ed. 480.

BUT EVEN IF DEPOSITS TO THE CREDIT OF DEFENDANTS IN ERROR OF THE PROCEEDS OF ORE SHIPPED WERE A CONDITION PRECEDENT IN THE CONTRACT, THEN BEFORE THE TIME FOR ITS PERFORMANCE, DEFENDANTS IN ERROR HAD ELECTED NOT TO SO CONSIDER SUCH CONDITIONS; HAD WAIVED THE CONDITION PRECEDENT, AND HAD ELECTED TO CONSIDER THE CONTRACT UNBROKEN BY PLAINTIFF IN ERROR'S FAILURE TO PERFORM.

On June 11, 1904, and five days after the receipt by the Nogales bank from the smelter company of the proceeds of the ore shipped, defendants in error instituted suit against plaintiffs in error. As appears from the avowal made by plaintiff in error on the trial of the case, had plaintiff in error been permitted to introduce in evidence the records of the case of Powers et al vs. The Worlds Fair Mining Company, they would have shown that defendants in error were suing plaintiff in error for an alleged debt of Ray Ferguson, and an alleged debt of the London-Glasglow Company incurred long previous to the organization of plaintiff in error, and for an alleged debt of plaintiff in error, the latter being for the proceeds of ores received as aforesaid by said Nogales bank for plaintiff in error. It would further have appeared that in affidavits to complaints, in attachment proceedings, in garnishment proceedings, and in applications for injunctions, plaintiff in error Powers had sworn that the said indebtednesses were, on said June 11, 1904, due, owing and unpaid. As the escrow instructions provided that plaintiff in error should have fifteen days after the receipt of the proceeds of such ores shipped, in which to deposit such proceeds at such Tucson bank,it is clear that defendants in error considered that the escrow instructions did not affect, modify or change the provisions of the original contract, (which latter only generally required the deposit without fixing a day

by which it should be made) and that in so far as defendants in error could do so, they had thereby and on the said June 11, 1904, waived all rights they might have had to consider the payment due on June 20, 1904, under the escrow instructions, as a condition precedent. As this waiver occurred nine days before the terms of the escrow instructions requiring the deposit of money, could become active as a condition precedent, or affect the rights of the parties to said contract, there was, therefore, and thereafter, no condition precedent to plead or prove in this case in that respect. Such waiver need not be pleaded because it was not a waiver made after the time for performance had arrived but was a waiver which eliminated the alleged condition predecent from the contract before the time for performance. In consequence when the time for performance arrived, the alleged condition had been eliminated from it and the contract did not contain it. It undoubtedly cannot be contended that it was necessary to either allege the performance, or an excuse for not performing such an eliminated condition. As the record in this case does not show any act on the part of defendants in error until they took forcible possession on July 25, 1904, indicating that they claimed or would claim a forfeiture of the contract by reason of the failure to perform any alleged condition precedent, the utmost that the evidence on this subject can show is attempts by defendant in error to force plaintiff in error to break the contract. It cannot show that defendants in error claimed and exercised the right to break the contract on their part. The correspondence between Mr. Booth and Mr. Ives hereinbefore referred to, occurring long after the instructions above referred to, sufficiently proved, we believe, that defendants in error never did terminate that part of the contract which gave plaintiffs in error the right to purchase the mines.

As we hereinafter argue under the heading, "The so-called condition precedent was satisfied and complied with nine days before the time for complying with it had arrived", neither title to ores taken out of the mines or the proceeds thereof was transferred by the contract or said escrow instructions from defendants in error to plaintiffs in error. Title to such ores and their products was at all times in defendants in error subject to plaintiff in error's rights to retain from such proceeds Twelve Dollars per ton and certain expenses, and should plaintiff in error have failed, at any time, to pay to, or to deposit to the credit of defendant in error, such sums, the latter sueing on the covenants of the contract, and alleging ownership, could have recovered such sums, but defendants in error in sueing plaintiff in error as herein set out and as shown by the pleadings and evidence in this case, elected to consider plaintiff in error as the owner of the money and sued for such money as a debt owing by the latter to the former.

"All actions which proceed upon the theory that the title to property remains in plaintiff are naturally inconsistent with those which proceed upon the theory that title has passed to defendant."

Cyc. Book 15, P. 258-9.

"The prosecution of one remedial right to judgment or decree whether the judgment or decree is for or against plaintiff, is a decisive act which constitutes a conclusive election barring the subsequent prosecution of inconsistent remedial rights."

Cyc. Book 15, P. 259.

"An election once made with knowledge of the facts between co-existing remedial rights, which are inconsistent, is irrevocable and conclusive irrespective of intent and constitutes an absolute barr to any action, suit, or proceeding based upon

remedial right inconsistent with that asserted by the election or to the maintenance of a defense founded on such inconsistent right."

Cyc. Book 15, P. 262-263.

The election by defendants in error to sue plaintiff in error in debt, for the proceeds of the ores shipped instead of for the recovery of the proceeds of the ore under the terms of the contract was such an election for the former assumed that plaintiff in error was the owner of the money and the latter would assume that defendant in error was the owner of the money, and as defendant in error was barred from bringing action upon more than one of the two theories, and elected to proceed upon the theory that the money belonged to plaintiff, defendants in error cannot in this suit, maintain a defense on the theory that the money was their property at the time they commenced their suit. The remedy they selected was in a garnishment suit, a judgment against plaintiff in error for its amount; they cannot now defend this suit on the theory that plaintiff in error was not so indebted and did not, nine days after they had so sued and garnished, deposit this money to their credit under the terms of the contract. They selected their procedure for getting the money and tied it up and took the money from plaintiff in error's hands thereby preventing plaintiff in error from delivering it to them, such action cannot be reconciled with a similar suit at the same time requiring plaintiff in error to deliver possession of the money to them, neither can they now defend upon the theory that it was plaintiff in error's duty to deliver the money which they had prevented plaintiff in error from delivering. They therefore had elected not to consider the condition relating to the payment of money for ores shipped as a condition precedent or had waived the condition precedent or had elected to consider the contract unbroken by plaintiff's failure to perform it.

The loss, damage or inconvenience, if any, to the defendants in error, from a failure on the part of plaintiffs in error to either, within a reasonable time under the terms of the contract, or within fifteen days after receipt under the escrow, deposit money in the Tucson bank could be compensated for by a suit for judgment for the amount of money due, and defendant in error having sought this remedy under the implied terms of the contract, have thereby declared that neither the conditions of the contract nor the conditions of the escrow in this respect were considered by them conditions precedent, under the definitions of the latter generally held by Courts.

New Orleans v. Texas & P. Ry., 171 U. S. 313, 334: Book 43 L. ed., 178, 186, supra.

FIFTH ASSIGNMENT OF ERROR

The Court erred in excluding the record in the case of Powers and wife vs. The Worlds Fair Mining Company offered by Plaintiff in error in this case. The complaint in this case alleges, that while Plaintiff in error was in possession, working, developing, and mining the mines, and shipping ore therefrom, attachments, garnishments and injunctions in the former case, were levied and served on Plaintiff in error and Plaintiff in error's property, that the service of these writs crippled, impeded, harassed and defeated the efforts of Plaintiff in error to carry out the terms of the contract and deprived Plaintiff in error of all its available assets in this Territory including the sum of Seven Thousand Dollars in the bank, and very much injured its credit; that Powers and wife caused these writs to be served for that purpose; that these acts followed by the subsequent taking by force of the mines, the machinery and improvements, prevented Plaintiff in error from

further performing the contract; that the said levy of the attachments and garnishments were never released by Defendants in error; that said suit was instituted and the attachments, garnishments and injunctioms were wrongfully and unlawfully served; that at the time said suit was instituted Plaintiff in error was not indebted in any sum to Defendants in error; all to Plaintiff in error's damage in the sum of One Hundred and Eighty-five Thousand Dollars. Defendants in error, in their answer in this case, specially alleged that Plaintiff in error was indebted to Defendant in error in the sum of Seven Thousand Three Hundred and Twenty-two Dollars and Two Cents and was indebted to Defendant in error in the further sum of at least Three Thousand One Hundred and Thirty-one Dollars and Sixty-six Cents for and on account of the London-Glasglow Development Company, and at the time of said suit of Frank and Josephine Powers was brought; and the said Powers and wife in the said suit caused the attachments and garnishments to be levied and the injunction to be served because Plaintiff in error was keeping and retaining the said sum of Seven thousand three hundred and twenty-two dollars and two cents, and without excuse, was withholding payment of the same to Defendants in error, and that the suit was instituted and writs sued out and levied to prevent other creditors of Plaintiff in error from levying upon and taking the property of Plaintiff in error; that Plaintiff in error was insolvent and unable to pay its debts, etc. Thus, in this case, the answer raised a direct issue as to whether Plaintiff in error was indebted to Defendants in error when the case of Powers and wife vs. The World's Fair Mining Company was commenced, and as to whether Defendants in error in good faith brought the suit intending to protect themselves or wrongfully and unlawfully were trying to prevent Plaintiff in error from performing under the contract. By

the general denials contained in Defendants in error's answer herein, all the other allegations of the complaint above referred to were put in issue.

Plaintiff in error, in its reply to Defendants in errors' answer made allegations emphasizing the importance of these issues and averring that the judgment in the case of Powers and wife vs. The Worlds Fair Mining Company had been entered in favor of Plaintiff in error; that amongst other things, the judgment decided that the latter case had been wrongfully and unlawfully brought; that the record in the last named case was the proper and the best evidence to sustain Plaintiff in error's foregoing allegations cannot be questioned and this Honorable Court has clearly and equivocally declared the rule to be, "Generally speaking, it is true that when a contract is not performed the party who is guilty of the first breach is the one upon whom rests all the liability for the non-performance. A party who engages to do work has a right to proceed free from any let or hindrance of the other party, and if such other party interferes, hinders, and prevents the doing of the work to such an extent as to render its performance difficult and largely diminish the profits, the first may treat the contract as broken, and is not bound to proceed under the added burdens and increased expense. It may stop and sue for the damages which it has sustained by reason of the non-performance which the other has caused."

The Anvil Mining Company vs. Humble, 153 U. S., Page 540, L. ed., Book 38, P. 814.

"If a party to a contract who is entitled to the benefit of a condition upon the performance of which his responsibility is to arise, dispense with, or by any act of his own prevent, the performance, the opposite party is excused from proving a strict compliance with the condition. Thus, if the precedent act is to be performed at a certain time or place,

and a strict performance of it is prevented by the absence of the party who has a right to claim it, the law will not permit him to set up the non-performance of the condition as a bar to the responsibility which his part of the contract had imposed upon him."

Dist. of Columbia vs. Camden Iron Works, 181 U. S. P. 453, 461-2, L. ed., Book 45, Pages 948-953.

The attachments, garnishments and injunctions still left Plaintiff in error in possession of the mines and the privilege of working them and the right to purchase them. Plaintiff in error was a corporation, with its principle offices in Winona, Minnesota. Even had it determined to stop further work on the contract when by means of the attachments, garnishments and injunctions it was impeded, harassed and defeated in its efforts to carry on the work, it would, of necessity, have taken some time to get the Directors together and to put the situation before them with the attendant facts, weigh the advantages and disadvantages, and transmit their determination to those in charge at the mine. Within a little more than a month, however, after the service of the attachments, etc., Defendants in error made further action or decision upon the part of Plaintiff in error unnecessary and unavailing for Defendants in error forcibly dispossessed Plaintiff in error of everything, pertaining to the contract except its right in a Court of Law to sue for damages. It does not seem to us that it can be seriously contended that by remaining in possession under the contract after the attachments, etc., and till the forcible dispossession, Plaintiff in error had waived its rights to assign a wrongful levy of attachments, etc., followed by the forcible dispossession, as grounds for suit for breach of the contract.

Sixth Assignment of Error

The Court erred in excluding the evidence called for by the questions propounded to Defendant in error Powers seeking to ascertain if he did not receive certain money deposited to Plaintiff in error's credit in the First National Bank and garnished in the said case of Powers and wife vs. The Worlds Fair Mining Company. The reasons and authority for this assignment of error have been fully argued in the argument on the preceding assignments of error.

Seventh Assignment of Error

The Court erred in not permitting Plaintiff in error to prove that it had made all necessary arrangements for money with which to carry on and complete the contract. The answer of Defendants in error in this case alleges that Plaintiff in error was insolvent, unable to pay the expenses of carrying on the contract, that the property of Defendants in error was in consequence suffering and would suffer damage and loss if they had not therefore taken forcible possession of the mines. Issue was taken upon this allegation by the general denial in the reply of Plaintiff in error and it was to meet this issue Plaintiffs in error offered the said evidence. The argument of the foregoing assignments of error cover this assignment also.

Eighth Assignment of Error

The complaint in this case alleged that Plaintiff in error was prevented from bringing into the Territory of Arizona, any additional sums or assets by the threats made by Defendants in error that

the latter would garnish and attach the same and thereby prevent Plaintiff in error from using such assets to enable it to carry on its covenants and agreement contained in the contract. By the general denial contained in the Answer, this allegation was denied by Defendants in error and was directly an issue. It was undoubtedly a material issue for with all of its assets in the Territory of Arizona tied up, if it could not bring other assets into the Territory, it surely could not proceed with work which necessitated constant expenditure of money. This assignment has been fully argued in previous assignments.

Ninth Assignment of Error

N. E. Webber, a witness for Plaintiff in error, testified that he knew the value of the contract Plaintiff in error had with Defendants in error, but objections being made thereto by Defendants in error, witness was not permitted to testify as to the value of the contract. This was error. "After a witness has testified that he knows the property and its value, he may be called to state such value."

Montana Ry. Co. vs. Warren, 137 U. S., P. 348, Vol. 34 L. ed., P. 681.

The So-called Condition Precedent was Satisfied and Complied with Nine Days Before Time for Complying with it had Arrived.

The only claim of forfeiture on the part of Plaintiff in error to perform a condition precedent was the claim, that Plaintiffs in error had not paid a sum of money on or before June 20, 1904, being money received from shipments of ore. This ques-

tion was directly put in issue by the pleadings as hereinbefore argued, and evidence upon that issue was admitted and other evidence was excluded as hereinbefore argued. This sum of money, viz: $7,672.78 was received from the smelter company by the Nogales bank and placed to the credit of Plaintiff in error, but at all times such portion of it as Defendants in error were entitled to was the money of Defendants in error, because it was the proceeds of ore owned by Defendants in error, and shipped and converted into money by Plaintiff in error acting under the provisions of the contract as agents for Defendants in error.

Central National Bank of Baltimore vs. Conn. Mut. L. Ins. Co., 14 Otto., 54-77; Book 26, L. ed., 693.

There was nothing in the contract or the course of dealing depriving defendants in error of their ownership of the ores or the proceeds thereof. The only interest plaintiff in error had in such proceeds was that of temporary possession and the right to pay itself, and retain twelve dollars per ton and certain expenses, out of it, depositing the balance in a reasonable time to defendants in error's credit. Defendants in error in the suit they instituted against plaintiffs in error declared that they were entitled to all the said proceeds, less the said certain expenses, viz: $7277.78, and they were entitled to it five days after its receipt by plaintiffs in error, if not sooner. (*Allegations of Answer, Pars. 6 and 7, Trans. P. 15-16.*) In their reply plaintiffs in error admitted that defendants in error were entitled to all of said proceeds except the said sum of twelve dollars per ton and the said certain expenses, in other words to the sum of $6426.78, and alleged that such sum was not required to be deposited to the credit of defendants in error till June 20, 1904, (*Trans. P. 18, Fol. 35-6.*) The Answer herein al-

leges that judgment in the case of Powers vs. The Worlds Fair Mining Company was rendered in favor of plaintiff for the sum of $6425.78, and that both parties to the litigation appealed. This Answer was filed April 10, 1906, (*Trans. P. 19, Fol. 37*). The reply alleges: "That the questions as to the right of the said Frank and Josephine Powers to sue the said defendant in the said case and to attach or garnish the property of The Worlds Fair Mining Company in said case, and to cause injunction to issue against The Worlds Fair Mining Company in said case and the right of The Worlds Fair Mining Company and its assignors of the contracts described in the pleadings herein, to have and retain the said twelve dollars per ton upon all ore shipped by it from said Worlds Fair Mines were directly in issue and were each and all decided against the said Frank and Josephine Powers and in favor of the said Worlds Fair Mining Company." This part of the reply was filed May 26, 1908. (*Trans. P. 19, Fol. 38-9.*)

There is therefore nothing in the pleadings to show that plaintiff in error have denied defendants in error's title to such $6426.78 as admitted by the reply, or to $6425.78 as found by the Court; it was at all times admittedly the property of defendants in error, but plaintiff in error had the right to its possession until June 20, 1904. On June 11, 1904, as shown by the pleading of defendants in error as well as those of plaintiff in error, the former took possession of this money from plaintiffs in error and placed it in the possession of the Court by the garnishment which they caused to be served in said case of Powers vs. Worlds Fair Mining Company. On the trial of the case, plaintiff in error sought to prove by defendant in error Powers, that defendants in error had taken possession of the proceeds of the ore deposited in the Nogales bank amounting to a much larger sum than the said $6426.78, and had retained

and kept it all. The Court did not permit this proof to be made. (*Trans. P. 39-40, Fol. 82-3*). Nor did the Court permit plaintiff in error to prove that it intended to deposit to the credit of defendants in error the said sum of $6426.78 when the time for such deposit, viz: June 20, 1904, arrived. (*Trans. P. 36-9, Fol. 75-81*). But plaintiff in error did prove that the garnishee in said case paid to the sheriff on order of Court in said garnishment proceedings and out of said garnished money $6930.69 on May 27, 1905. (*Trans. P. 41, Fol. 85-6.*)

Without, at this time, attempting to discuss the other deductions from the foregoing facts, we feel that we can safely urge that the one and only thing plaintiff in error is charged with having omitted to do, in the performance of the so-called condition precedent, viz: the delivery of the proceeds of ore shipped to the defendants in error, is shown to have been completely and fully complied with and the conditions satisfied nine days before the time for performance. Having no title or right except that of possession and the possession having been taken from plaintiff in error, by defendant in error, nothing remained for plaintiff in error to do.

IN CONCLUSION

The Supreme Court of Arizona, in this case, has declared, "The evidence of the plaintiff showed at the close of its case that on the 25th day of July the company was ousted from the premises and the damages suffered by it thereby. This was a clear breach of the contract for which such damages might be recovered by the company, if at the time they had the legal right to maintain the claim. But apart from the limitations of the complaint, the evidence of the plaintiff also affirmatively showed

that the company itself had prior to the ouster failed on its part to live up to the requirements of the contract, in that the deposit of the ore proceeds had not been made as required, and no excuse therefore had been pleaded or proved. The company having elected to continue under the contract after the alleged acts of interference and hindrance by reason of the injunction and attachment suit, was bound to perform its covenants or plead and prove excuse for failure to do so, and in default thereof, having itself committed the first breach of the contract, it could not maintain this action against Defendants for their subsequent breach of ouster."

Worlds Fair Mining Co. vs. Powers et al (Ariz.)
100 Pac. P. 960.

That Plaintiff in error was therefore on the facts clearly entitled to damages is expressly declared by the Court and that its only bar to recovery of judgment for these damages was its failure to plead, not prove, an excuse for its failure to perform the alleged condition precedent is also declared by the Court. That until the time this ruling was made in the lower Court neither party to the contract ever considered this provision of the contract as a condition precedent has been, we believe, already herein conclusively shown. That the Defendants in error long after the injury complained of herein strenuously maintained and declared that this so-called condition precedent did not affect and was not even a part of the contract, has been in express language by the Arizona Supreme Court declared to be shown by the records of the same case that Plaintiff in error offered but was not permitted to introduce as evidence in this case.

Powers et al vs. Worlds Fair Mining Co., (Ariz.)
100 Pac. 956.

That no issue was raised by the pleadings based upon the Arizona Court's holdings that the said provision was a condition precedent is conclusively shown by the pleadings and it is only by giving to what, at its best is but ambiguous language of the contract and escrow instruction, a meaning utterly different from what the parties to the contract intended and believed it to have that the decisions of the Arizona Courts in this case can be sustained.

That there has been a miscarriage of justice in this case is as aforesaid expressly declared by the Arizona Supreme Court in this case. That this miscarriage of justice was caused by the omission of the plaintiff to make a formal allegation is also declared by the Arizona Supreme Court in this case. That the interpretation put upon certain language of the contract and escrow instructions by the Supreme Court in this case is a different interpretation than that put upon the contract and escrow instructions by the parties to this litigation and was a meaning given to them not intended by either of the parties to this litigation at the time they were executed is also declared and shown by the decision of the Supreme Court of Arizona in this case, and in the said case of Powers vs. The Worlds Fair Mining Company, the decision in which was rendered just before and on the same date as their decision in this case. And it would seem almost equally clear that it was to prevent such injustice that the Supreme Court of Arizona some two years after its judgment was rendered in this case declared "Considering the question again from a standpoint of policy, it is a too common matter of observation to be doubted that the most careful and experienced of practitioners fail at times in the statement of their client's cause of action through no fault, but because of the unsettled condition of the law * * * * * It is not, however, the purpose of the law to prevent trials where litigants have moved diligently though

erroneously * * * * * To permit the use of the technical law of pleading, formulated to facilitate trials and to render more certain the administration of justice, to defeat a hearing and determination of what is justice, is wholly inconsistent with the spirit and policy of our law which seeks a determination of every case upon a trial of the merits."

Bourdreaux vs. Tucson Gas E. L. & P. Co., (Ariz) 114 Pac. P. 547. See P. 552.

The complaint in this action alleged facts from which it is impossible to conclude that Plaintiff in error could have performed the so-called condition precedent and that this condition was brought about by the wrongful action of Defendants in error. The most technical rules of law could not have required that the complaint contain any other allegations than the bare statement that plaintiff was thereby prevented from paying the money so garnished as aforesaid to Defendants. This is not the allegation of a fact. It is the allegation of a conclusion from facts and as before stated, no other possible conclusion could have been drawn from the facts alleged. If justice can be defeated by such a technicality then the most immaterial technicalities and forms of law are placed upon a higher plane than any other principle of law. The Courts of the United States agree in declaring that no general principle can be laid down for determining whether a condition of the contract is a condition precedent or not but that in each case that question must be determined upon its own showing. Where no general principle can be found to guide a litigant or his attorney it would seem that some consideration should be given to the shortcomings of the law as well as to the litigant and his attorney, and it would further seem that under such rules of practice as are prescribed by the laws of Arizona wherein the Courts are instructed to at every stage of an action disregard any error or

defect in the pleadings or proceedings which shall not affect the substantial rights of the parties, and where pleadings are only required to consist of a concise statement of the facts constituting the plaintiff's cause of action (*Revised Statutes of Arizona P. 428, Par. 1293, and P. 427, Par. 1277*) that every indulgence should be given to the parties to an action in the consideration of technical forms.

Under the Statutes of Arizona, the judge is prohibited from commenting on the weight of the evidence and is required to "submit all controverted questions of fact solely to the decision of the jury." (*Revised Statutes of Arizona, Ps. 449-50, Par. 1408.*) The whole system of pleadings is designed to submit to the jury when desired all controverted questions of fact with as much freedom from technicalities as can justly and safely be done. The Arizona Courts were not asked to determine whether the conditions of the contract was a condition precedent, they were not asked to so interpret the contract as to defeat the case by reason of the so-called condition precedent and they knew as matters of fact that the plaintiff did not consider the condition a condition precedent and that the defendants had at all times theretofore maintained that the condition was not a condition precedent. Yet interpreting the contract differently from that interpretation given to it by the parties to the action they raised a technical rule of pleading to accomplish that thing that the higher Court subsequently denounced as "Wholly inconsistent with the spirit and policy of our law, which seeks a determination of every case upon a trial of the merits."

Respectfully submitted,

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IN THE

Supreme Court

OF THE

United States.

The World's Fair Mining Company,

Plaintiff in Error,

vs.

Frank Powers and Josephine Powers,

Defendants in Error.

BRIEF OF DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

Prior to September 4th, 1903, Frank Powers and Josephine Powers were the owners of a group of mines situated in Santa Cruz county, Arizona, known as the World's Fair group. On that day they entered into a contract with one Ray Ferguson for the sale of the mines. This contract is set forth at pages 8 and 10 of the transcript of record. By its terms, the Powers' agreed to sell

the mines to Ferguson for $450,000.00 and one-fourth of the capital stock of a corporation to be organized by Ferguson. Ferguson was given the right to enter into possession of the mines and agreed to do a certain amount of work per day, to reduce certain ores and to pay the proceeds derived therefrom, after deducting certain expenses, in a bank at Tucson, Arizona, the amount so deposited to remain in trust until the completion of the work or the payment of the purchase price. Subsequently and on April 15, 1904, an escrow agreement was made between the parties by which a deed for the property was deposited with the bank, and which also provided that upon demand by Powers to the bank, the bank should ascertain whether Ferguson had deposited the net proceeds of the ores within 15 days after their receipt by him from the smelter, and if such deposit was found not to have been made, then the bank was to return the deed to Powers. This escrow agreement is set forth as exhibit B, pages 10 to 12 in the transcript. On the same day a supplemental agreement was made by which the contract of September 4, 1903, was modified so that the moneys to be deposited in the bank should not be deposited in trust but to the joint account of the Powers' and credited upon the purchase price. This supplemental agreement is set forth as exhibit C, on page 13 of the transcript.

Pursuant to the agreement of September 4th, 1903, Ferguson organized a corporation called the London-Glasgow Development Company. This corporation entered into possession of the mines and commenced the operation of the same and the reduction of the ores. That company received as the net proceeds of the ore several thousand dollars, which it did not deposit according to the agreement. The contract had been assigned by Ferguson to the London-Glasgow Development Company, and Ferguson and his associates subsequently organized the World's Fair Mining Company, and the contract was assigned to that company. That company then entered into possession of the property and continued to work the mines and reduce the ores under the contract. On June 6th, 1904, the last named company received several thousand dollars as net proceeds from ores smelted. On June 11th, 1904, the Powers' attached this money in an action brought by them, they claiming that the amount was then due and unpaid and that the company was intending to convert the net proceeds of the ore to its own use, contrary to the terms of the contract, and at the same time obtained a temporary injunction against the company restraining it from shipping other ores from the mines. This injunction was shortly afterwards dissolved, but the attachment remained in force.

On July 25th, 1904, the Powers' dispossessed the company by forcibly taking possession of the mines. The company thereafter brought this action for damages for breach of the contract by the Powers'. The complaint set up the original contract with Ferguson, the subsequent modification and the escrow agreement, the subsequent assignment of the contract to the plaintiff, the institution of the suit by the Powers' and the attachment and injunction therein. It alleges that the suit was wrongfully brought and garnishments and attachments levied with the intent and object of breaking the contract with the plaintiff, and of preventing it from carrying out the contract; that at the time the attachment was served the plaintiff owed the Powers' nothing; that by issuing the attachment the company was made to fear that if it brought any other moneys into the territory for the purpose of carrying out its operations under the contract, such moneys would also be attached; that the attachment and the injunction injured the company's credit and crippled the company's business and impeded its efforts to work the mines. *The complaint further alleges that "when the plaintiff had finally succeeded in overcoming the conditions occasioned by the wrongful and unlawful acts of the defendants,* and on July 25th, 1904 [folio 11], the Powers' forcibly entered into possession of the mines and deprived the company of the posses-

sion thereof and of the right to work them, thereby rendering the contract valueless to the company.

There is no allegation of performance or non-performance and excuse therefor in the complaint.

The answer, while admitting the execution of the agreement, denied generally the allegations of the complaint. It alleged that neither the plaintiff nor his predecessors in interest complied with the terms of the contract; that the plaintiff and its successors in interest had retained and converted to their own use certain proceeds from the reduction and sale of the ore to which the defendants were entitled under the terms of the contract; that the attachment and garnishment set forth in the complaint was necessary by reason of the intention of the plaintiff to use the funds and to convert the proceeds of the ore, due to the defendants, to its own use. The complaint further alleged improper and wasteful management of the mines by the plaintiff, and prayed judgment dismissing the complaint. The plaintiff for reply to the answer denied that at the time of the attachment it owed all the money attached by the Powers', and alleged that it was not its duty to make payment of such amount as it did owe on the date of said attachment, to-wit, the 11th day of June, 1905 (meaning 1904), but that it was not its duty to make such payment until the 20th day of June, 1904; that on the 11th

day of June, the Powers' instituted the suit referred to in the complaint and caused the money to be attached with the purpose and object of forcing plaintiff to break the contract, and that for this reason the Powers' thought that by instituting the action and causing the attachment and injunction to issue, through the injury to the company's credit, it would be unable to carry out its contract with the Powers'. The reply further alleged "that finding that the plaintiff still endeavored to continue under the terms of their said contract, the defendant Frank Powers, for himself and the other defendant, with force and arms entered upon the mines described in the amended complaint and took forcible possession thereof with the intent and object to wrongfully terminate said contract and to deprive the plaintiff of the profits thereof." The reply, if it could effectually do so, nowhere alleges either performance or non-performance and excuse therefor.

The cause was originally brought in the District Court of Santa Cruz county, Arizona, but by stipulation was transferred to the District Court of Pima county, Arizona, and there tried before a jury. The court directed the jury to return a verdict for the defendants, and judgment was entered accordingly. The plaintiff appealed to the Supreme Court of Arizona, which affirmed the judgment of the District Court. From the

judgment of the Supreme Court of Arizona the plaintiff in error prosecuted this writ of error.

The Supreme Court of the territory held that the only question before that court was the action of the trial court in directing a verdict for the defendants and its refusal to permit the plaintiff to introduce in evidence the record of the proceedings in the injunction and attachment suit brought by the Powers' against the plaintiff.

No other question was presented to that court, and this court limits its inquiry to the matter presented to and reviewed by the Supreme Court of the territory.

> Montana Ry. Co. v. Warren, 137 U. S. 348.

To these questions, therefore, this brief will be addressed.

The evidence showed without contradiction that on June 6th, 1904, the World's Fair Mining Company received as the proceeds of ore shipped from the mines mentioned in the contract the sum of $7,672.78. [Folios 86 and 110.] Only $234.39 was ever deposited in the Arizona National Bank to the credit of the Powers'. [Folio 113.] It is admitted that of the sum received $6,426.78 belonged to the Powers' and that it was the duty of the company under the contract to deposit that sum to their credit in the Arizona National Bank. [Folio 36.]

The parties have differed as to the time when this deposit should be made, the Powers' claiming that their right to the net proceeds accrued immediately upon their receipt by the company, and the company claiming that by virtue of the escrow instructions it was not required to make such deposit until the 21st day of June, 1904. This difference is, however, entirely unimportant, as it is admitted that the deposit was not made at all.

It was held by the trial court that the mutual agreements between the parties were concurrent and dependent; that the bringing of the injunction and attachments suit was not a breach of the contract, the company having elected to treat the contract as in force after the acts; that the failure to make the deposit of the proceeds of the ore as required by the contract was such a breach of the contract as to authorize the Powers' to treat the contract as terminated, and that the complaint not alleging performance by the company or an excuse for non-performance did not furnish the basis for the admission of evidence to show such excuse. These views were concurred in by the Supreme Court of the territory, and will be discussed *seriatim.*

I.

The company's obligation to deposit the money was a condition precedent and it must allege and prove the fulfillment of the condition or a legal excuse for its non-performance.

The contract between the Powers' and Ferguson, after providing for the sale of the mines, contains an agreement on the part of the Powers' for the depositing of a deed in escrow, the condition of which should be that the other party should faithfully perform the terms of the agreement. It then provides that Ferguson should perform certain work upon the property; that the ore which might be extracted or which was then on the property should be reduced, and that the net proceeds thereof should be deposited in a specified bank, and were to remain in trust until the termination of the contract. This provision was subsequently modified so as to provide that the moneys so deposited should be placed to the joint account of the Powers' and credited upon the purchase price.

By the escrow instructions it was provided that in the event of the failure of Ferguson to deposit the proceeds, or in the event of his failure to do the work as provided, the bank after ascertaining either of those matters, should return the deed executed by the Powers' to them, and destroy the deed given by Ferguson to the company. Without comment-

ing further upon the provisions of the contract, it seems clear that the agreements of each of the parties were concurrent and dependent and not independent.

In contracts like the one in question containing mutual promises, if the obligation of the one promise is expressly or impliedly conditional upon the due performance of the other, then the performance of the one promise is a condition precedent to the liability to perform the other.

9 Cyc, p. 642.

Of course, the obligation of the one promise may be quite independent of the performance of the other, and in such case the performance of the one promise is not a condition precedent to the liability to perform the other.

The courts at the present day incline strongly against the construction of a promise as independent, and in the absence of clear language to the contrary, promises which form the consideration if doubtful, will be held to be concurrent or dependent, and not independent, so that failure of one party to perform, will discharge the other, and so that one cannot maintain an action against the other party without showing performance on his part.

9 Cyc, p. 643-4, and
Cases cited in note 60, page 644.

It is obvious that the Powers' contract to permit the company to remain in possession of their mines and to ship ore therefrom was dependent upon its promise to deposit the proceeds of such ores after the stipulated deductions, to the credit of the Powers, otherwise the company during the life of the contract or for twenty months could have maintained the right to despoil the Powers' mines and retain all of the proceeds.

The escrow instructions (exhibit B) provide that if the proceeds of the ore should not be deposited to the credit of the Powers' within fifteen days after receipt, the deed in escrow should be returned, which was in effect a provision that in such event the rights of the company under the contract should cease and determine.

If these escrow instructions be given the weight of a contract as contended by plaintiff in error, then there can be no doubt whatever that such deposit was a condition precedent to its right of possession.

If, on the other hand, it should be held as contended by defendants in error, that the escrow instructions did not change the original contract between the parties, then, of course, the company was in default with respect to the deposit of such moneys prior to the 11th of June, 1904, and the institution of the suit with its attendant attachments and garnishments were rightful and proper, and plaintiff in error's entire cause of action fails.

Powers' cause of action for the $6400 accrued immediately upon the receipt of the smelter returns by the company.

Green v. Robertson, 64 Cal. 75, 28 Pac. 446.

Hoch v. Bass, 126 Pa. St. 13, 17 Atl. 512.

Even after the 21st of June arrived the company did not consent to judgment in favor of the plaintiffs for the $6400 conceded to be due them, but persisted in resisting their claim, and they did not as a matter of fact get the money until after the trial a year later in May, 1905, at which time it appears by the pleadings that judgment was entered for such amount in favor of the Powers, plaintiffs in that action.

It will be further borne in mind that by the terms of the original contract, Ferguson "agreed" to ship the ores. In other words, the receipt of such proceeds was to be a part of the income of the Powers'. It was never contemplated by them that their enjoyment of the profits of their mine should be suspended for twenty months. They were to receive their regular income, notwithstanding the contract and the possession of the mines by other parties. This covenant was an essential part of the contract.

"Where an action is brought to recover damages for the breach of an executory contract containing mutual undertakings, and those on the part of the plaintiff are to be

performed before the defendants are to perform their part, the declaration should allege a performance by the plaintiffs of their undertakings, or a sufficient excuse for non-performance; and an allegation that it was the duty of the defendants under said contract to perform their part without stating the facts imposing such duty, is not equivalent to an allegation that the plaintiffs had performed their part."

Milligan v. Keyser, 52 Fla. 331, 42 So., p. 371.

"If the covenants are mutually dependent, one party cannot recover without averring performance or an offer to perform on his part."

Kane v. Hood, 13 Pick. 281.

"The refusal of one party to perform his contract amounts on his part to an abandonment of it. The other party thereupon has a choice of remedies. He may stand upon his contract, refusing assent to an adversary's attempt to rescind it * * * or he may assent to its abandonment, and so effect a dissolution."

Graves v. White, 87 N. Y. 463.

"Plaintiff who fails to perform according to the terms of the contract, cannot maintain an action on the contract."

Dermott v. Jones, 64 U. S. 23 How. 220.

"One who is himself in default cannot recover damages from the other party who rescinds the contract."

Fancher v. Goodman, 29 Barb. 315;

Chicago B. & Q. R. Co. v. Cochran, 42 Neb. 531.

"If a contract is broken by one party he has no right while refusing or unable to perform its terms to complain of the rescission of the contract by the other."

McColl v. Frith, 101 N. Y. 677.

"When the terms or covenants in an agreement are mutual or dependent or concurrent, the plaintiff must aver and prove performance or at least an offer to perform on his part."

9 Cyc. p. 720, and numerous cases cited in note 466.

It is submitted, therefore, that there can be no doubt but that it was the duty of the company to allege and prove that it had performed that covenant of the contract which required it to deposit the proceeds of all ore shipped by it within fifteen days after its receipt of such proceeds.

II.

The institution of the action by defendants in error on June 11, 1904, was no excuse for non-performance.

It is not alleged that the action was brought maliciously; in other words, this is not an action for malicious prosecution. The allegation that the attachment and injunction were issued wrongfully has no place in this action whatever; the remedy of the plaintiff in error for such wrongful attachment and injunction are confined to its action upon the bonds.

"In an action for unlawful attachment, not brought upon the attachment bond, the complaint must allege that the attachment was sued out maliciously, and without probable cause, and the omission of such allegation is not cured by verdict where the sufficiency of the pleading is challenged at the trial."

Mitchell v. Silver Lake Lodge, 29 Oregon 294, 45 Pac. p. 798.

"Where an attachment is premature and unlawful, the only remedy in the absence of malice is on the attachment bond."

Frantz v. Hanford, 87 Iowa 469, 54 N. W. 474.

"Whether the party aggrieved has any other remedy than by an action on the bond for an injury caused by an attachment, which lacks the elements of malicious attachment, is a proposition in regard to which there is some conflict of authority.

"It is held in a number of states that the sole remedy of the party is by action on the bond. In other states the contrary conclusion has been reached upon the theory that statutes of the character under consideration impose a liability for wrongful attachment, which may be enforced independently of the bond; and they accordingly allow the party aggrieved the option of bringing suit on the bond, *or in tort for the wrong.*" (Italics are ours.)

4 Cyc. p. 845, and cases cited.

It is nowhere alleged in the complaint that the institution of the action and the issue of the at-

tachments and injunctions as a matter of fact interferred with plaintiff in error in its operations under the contract, or tended to prevent its fulfilling the particular covenant under consideration, to-wit, the depositing of the money before the 21st of June, 1904.

The attachment of the money was not of itself a sufficient excuse for the non-performance of the covenant to deposit it to the credit of the Powers'. Proof of such attachment if accompanied by evidence that as a matter of fact such attachment did prevent the deposit of the funds would be excuse for such non-performance. Therefore, if the complaint had alleged non-performance, and that the attachment had prevented performance, the court would have admitted in evidence the complaint and proceedings in the action brought on the 11th day of June, as tending to prove and a part of the proof of excuse for non-performance. In fact, the court repeatedly so stated, virtually inviting counsel for plaintiff in error to offer to amend the complaint, but no offer to amend was made, and the absence of the all-essential allegation made plain the court's duty to exclude the evidence.

To repeat, therefore, the mere allegation of the institution of the action was not an allegation of an excuse for the non-performance and we will look in vain in the complaint for any further averment on the subject.

The allegation in paragraph VII is that the defendants brought such suit and obtained the injunction with the intent and object of breaking and abrogating their contracts, and "threatened and gave out that they would attach and garnishee any other funds that the plaintiff should bring into the territory."

In paragraph IX it is alleged that such actions of the defendants

"caused the plaintiff to fear that if it sent any more money or property into the territory, it would simply result in new attachments and garnishments; that the actions of the defendants injured plaintiff's credit in the territory and elsewhere amongst people to whom it could appeal IN CASE it needed money or property."

But it is not alleged that such actions did as a matter of fact prevent plaintiff from bringing money into the territory or that it as a matter of fact needed money, and that, therefore, it was damaged by its fears or by the alleged injury to its credit.

But, howsoever such allegations may be interpreted, their effect is totally nullified by the concluding allegations in paragraph IX, as follows:

"When plaintiff had finally succeeded in overcoming the conditions occasioned by the wrongful and unlawful acts of defendants, and on or about the 25th day of July, 1904,"

the defendants forcibly dispossessed the plaintiff.

Here is an affirmative allegation to the effect that the attachment and garnishment and injunction and the company's fears and loss of credit, as a matter of fact, did no serious harm to it; that they were simply unfavorable conditions caused by the Powers' action, which unfavorable conditions plaintiff in error succeeded in overcoming.

The conclusion is inevitable, therefore, that the only breach of contract upon which plaintiff in error had the right to rely was the act of dispossession on the 25th of July, 1904, and that this act having occurred subsequent to its failure to fulfill its covenant to deposit the proceeds of the ore, it cannot recover therefor.

III.

Defendants in error had the right to rescind the contract and dispossess plaintiff in error for non-performance.

The law on this subject is stated in the case of Norrington against Wright, 5 Fed. p. 768, as follows:

> "The right to rescind a contract for non-performance is a remedy as old as the law of contract itself. Where the contract is entire, —indivisible,—the right is unquestioned. The undertakings on the one side, and on the other, are dependent, and performance by one party cannot be enforced by the other, without performance, or a tender of performance on his own part." * * *

"To render the plaintiff's position logical, it is necessary to take a step forward, and hold that such a transaction (it would not be accurate in this view to call it a contract), constitutes SEVERAL DISTINCT, INDEPENDENT contracts. Then, of course, it follows that a failure as respects one of several successive deliveries, affords no right to rescind in regard to those yet to be made. And this step after much apparent doubt and hesitation, the English courts have taken. It was the necessary outgrowth of the decision in Simpson v. Crippen, which overruled Hoare v. Rennie. In our own country the cases are inharmonious, and the question unsettled. After a careful examination of what has been said on the subject, I shall not be surprised if the courts here finally adopt the present English rule, and thus substitute damages for the remedy by rescission, to the extent there done."

Norrington v. Wright, 5 Fed. p. 768, at pages 771-772.

It will be observed that the contract under consideration in that case was a severable contract, while the contract in question is an entire contract.

It will be further observed that Judge Butler in rendering the opinion in that case says that the English authorities were not in accord with the Federal Court's decision, and expresses his opinion that the future tendency of American courts would probably be to adopt the principle of the English decisions.

Circuit Judge McKennan, while concurring in the decision, refers to Judge Butler's views as expressed, and says:

> "I am not satisfied that the weight of authority in this country is preponderating in favor of following the English rule. I have very grave doubt as to the justice of this rule and am not disposed to follow it. I am not willing to take this advance step."

The case was appealed to the Supreme Court of the United States, which affirmed the judgment of the Federal Court, and reviewed all the authorities, American and English, so extensively that we feel it unnecessary to cite any other authority on the subject.

It will be seen that the Supreme Court of the United States went further even than Circuit Judge McKennan, and after an elaborate review of the English authorities differed from Judge Butler and came to the conclusion that the true rule adopted by the English courts was not as stated by Judge Butler, but was in accord with the principle as laid down by the Federal Court and affirmed by the Supreme Court of the United States.

After lengthy discussion, the Supreme Court of the United States concluded with the statement:

> "His failure to fulfill the contract on his part in respect to these first two installments,

justified the defendants in rescinding the whole contract."

Norrington v. Wright, 115 U. S., p. 188 at p. 205.

"If there is anything well settled it is that the party who commits the first breach of the contract cannot maintain an action against the other for a subsequent failure to perform. The plaintiff has not kept the contract, and shows no excuse for his breach. It does not, therefore, show any such performance on its own part as to entitle it to demand that the defendant shall go on and perform, or pay damages for a subsequent refusal to recognize the contract as in force."

Loudenback Fertilizer Co. v. Tennessee Phosphate Co., 121 Fed. 298; 61 L. R. A. 402, at p. 407.

IV.

Plaintiff in error having elected to continue under the contract after the alleged acts of interference and hindrance on the 11th of June, 1904, was bound to perform its covenants, and therefore having failed to deposit the money on the 21st day of June, 1904, is precluded from recovering in this action.

This principle is tersely stated by the Supreme Court of the United States in the following language:

"The plaintiff denying the defendant's right to rescind and asserting that the contract was still in force was bound to show such performance on his part as entitled him

to demand performance on their part, and having failed to do so, cannot maintain this action."

Norrington v. Wright, 115 U. S. at p. 205.

"Although such suspension or interruption of the mill power, might be construed to be the breach of a condition precedent, which would warrant the other party to break off and excuse the further performance of the contract; yet, it is at his option to do so, or to waive the breach, and proceed with the contract. And if he continues in the performance of the contract, until the impediment is removed and the power re-established, this amounts to a waiver of the forfeiture, and the party will no longer be excused thereby from the further performance of the contract."

Mill Dam Foundery v. Hovey, 21 Pickering, 417 at pp. 444-445.

"When the deceased committed a breach, the plaintiff was privileged to adopt either one of two courses—he could abandon further work under the contract altogether and sue to recover the price of work already performed, and whatever damages he had already sustained because of being prevented from completing the contract; or he could continue under the contract, to do so much of the work as he was permitted to do, and recover damages for the interruption. But in case he did so, there is no reason why he should not be bound by the terms of the contract, so far as he did attempt its performance, and responsible for any breach of

condition not dependent upon the neglected performance of the other."

McGregor v. Ross' Estate, 96 Mich. 103; 55 N. W. 658.

This case was cited with approval and the principle reiterated by the Supreme Court of Michigan in the case of Robinson v. Lake Shore Ry. Co., 61 N. W. 1014.

See to the same effect

Rodermund v. Clark, 46 N. Y., p. 354, at p. 357;

Robb v. Voss, 155 U. S., p. 13; 39 Law Ed. at p. 62-3;

Keedy v. Long, 71 Md. 385; 18 Atl. 704; 5 L. R. A. 759;

Goodsell v. Western Union Telegraph Co., 55 N. Y. Superior Ct. 183;

Pakas v. Holmshed, 184 N. Y. 211; 77 N. E. 40; 3 L. R. A. (N. S.) 1042.

This rule differentiates this case from the case of Anvil Mining Company v. Humble, 153 U. S. 540, relied on by the plaintiff in error in the courts below. If the institution of the attachment and injunction suit and the proceedings had in that suit constituted a breach of the contract, the company might have elected to treat the contract as terminated and recovered such damages as might have resulted. But it did not do so. It elected to continue under the contract, and having so

elected it waived its right to terminate the contract and was as much bound to perform its conditions as if Powers had never brought his suit.

V.

The exclusion of the pleadings and judgment and other documents in the suit brought by defendants in error on June 11th 1904, was not error.

As heretofore contended, the mutual agreements contained in the contract were concurrent and dependent. It was incumbent upon the plaintiff, therefore, in an action for breach of the contract, to plead and prove either performance on his part of the conditions to be performed by him, or an excuse for non-performance.

Under the statutes of Arizona, a plaintiff is permitted to allege in general terms, or, in the language of the statute, "that the party duly performed all the conditions on his part." Revised Statutes, Arizona, paragraph 1283. The plaintiff, therefore, might, had he claimed performance on its part, have alleged either generally or specifically such performance, but there is absolutely no allegation in the complaint in this case, either general or special, of performance.

It is equally well settled that one seeking to excuse non-performance by reason of the conduct of the other party must affirmatively allege in his pleading a sufficient excuse for non-per-

formance, and must set forth the facts constituting the excuse.

9 Cyc. 719, 720, 722, and cases cited;
Dermott v. Jones, *supra.*
Buchanan v. Layne, 95 Missouri Ap. 148, 68 S. W. 952.

The rule was stated by the Supreme Court of New York in the case of Stern v. McKee, 70 N. Y. App. Div., 142; 75 N. Y. S. 157, as follows:

> "The plaintiff, having predicated his right to recover on the breach of the agreement, was bound to allege and prove performance on the part of his assignor, or an excuse for non-performance, and, if an excuse were relied upon, then he was bound to allege facts constituting such excuse, and in addition thereto that he was at that time ready, and had the ability, to perform, and would have done so except for the acts of the other parties to the contract."

Purude v. Nofsinger, 15 Ind. 386;
Jones v. Singer Mnfg. Co., 38 W. Va. 147, 18 S. E. 478.

Even had there been an allegation of performance, an excuse for non-performance could not be shown.

> "The complaint proceeds upon the theory of the performance of the conditions and excuse for non-performance if relied upon should have been pleaded, and cannot be proven under the averment of performance."

White v. Mitchell, 30 Ind. App. 342; 65 N. E. 1061.

It is obvious as before stated that this is an action for the breach of the contract and for the value of the contract, and is not an action for damages for the wrongful issuance of an attachment in injunction. By both the courts below it was so treated as well as by counsel and will doubtless be so treated by counsel for plaintiff in error in this court. The rules of pleading applicable to such an action have therefore full application.

In this case the complaint totally fails to plead either performance or excuse for non-performance, though it sets forth the contract in full, and as stated by the court below,

"so in the plaintiff's reply even, though by the answer the failure of the company in this respect was distinctly averred, there is no direct allegation that the attachment proceedings prevented in any manner the company from depositing the ore proceeds, except such as might be inferred from the allegation that the attachment covered all the company's personal property in the territory; and this inference that the property in the territory was the only property of the company is negatived by the allegation of the complaint that the attachment suit caused the company to fear similar proceedings against any other funds it might bring into the territory." [Folio 142.]

The only materiality of the record of the injunction and attachment suit would rest upon the theory either that such proceedings themselves constituted a breach of the contract, or so prevented the company from making the required deposit as to amount to an excuse for not making

it. That they did not constitute an actionable breach is shown by the allegations of the complaint that whatever annoyance or difficulty they may have caused was overcome subsequently and that it continued to act under the contract and elected to treat it as continued and in force. That it did not prevent the plaintiff from making the deposit because it tied up all the funds of the company is not alleged, and any inference that might be drawn from the complaint to that effect is negatived by the allegation referred to in the above quoted portion of the opinion of the Supreme Court of the territory. The complaint wholly fails to state any cause of action because it contains no allegation of performance or excuse for non-performance and hence it could not be error to exclude any evidence which might have been offered in its support.

But the only purpose for which the excluded record could have been material being to show such excuse and no excuse being pleaded, the trial court was obviously correct in excluding it. The defects in the complaint were sharply brought to the attention of the plaintiff's counsel, and the failure to allege an excuse for non-performance was plainly stated by the trial judge as his reason for his ruling and indeed the court did everything to suggest the propriety of an amendment to conform to the offered evidence, except to flatly request counsel to make application for

such amendment. [Folios 77, 80; opinion Supreme Court folios 143-145.] No such application was made, however, and the court had no alternative except to exclude the offered evidence.

VI.

The offered documents not being contained in the record, their exclusion cannot be assigned as error.

The only documentary evidence contained in the record consists in a number of unimportant letters between an officer of the company and counsel for the Powers'. Not one of the numerous documents specified by counsel for plaintiff in error in his various offers is set forth in the record. Their contents are wholly undisclosed, and there is nothing from which it can be inferred what was or was not set forth in them except the general designation of them as "complaint," "answer," etc. What allegations were contained in the pleadings or affidavits referred to cannot even be inferred. Whether or not the debt arising from the receipt by the company of the proceeds of the ores was due does not determine whether the attachment was wrongful. Under the statutes of Arizona, an attachment will lie under certain circumstances, even though the debt be not due. It is provided by paragraph 335, Revised Statutes of Arizona, 1901, that

"The writ of attachment above provided for may issue, although the plaintiff's debt or demand be not due. * * * In order to obtain an attachment for a debt or demand not due it shall be necessary for the plaintiff or someone in his behalf to make an affidavit * * * showing * * *"

And then follows various matters which if shown by the affidavit warrant the issue of an attachment, such as, the defendant is about to remove his property to defraud his creditors, etc. In this state of the record, it cannot be determined without the inspection of the excluded documents whether they were material for any purpose or whether it was error to refuse to admit them.

The rule as to the necessity of embodying copies of excluded papers in the record is stated by Mr. Justice Lamar:

> "Objection by plaintiff below to this (the offer of certain patents) was sustained and exception taken. The plaintiff in error, however, has not embodied copies of these patents in the record returned. The court is therefore left uninformed as to the contents of the patents, or as to their materiality. What effect might have been given to this assignment of error, had evidence of the contents of the patents mentioned been sent up with the record, we need not consider in disposing of the case. It is sufficient to say that this assignment of error is fatally defective for the reason given above, and it cannot be sustained."
>
> Clement v. Packer, 125 U. S. 309.

And in Masonic Ben Ass'n v. Lyman, 60 Fed. 498, the rule is thus tersely stated:

> "To enable this court to review the action of the court below, it is necessary that the excluded evidence should be incorporated in the bill of exceptions; otherwise, the court has no means of forming a judgment in regard to the propriety of the alleged erroneous ruling."

In that case, as in this, the excluded evidence was documentary.

Nor can it be said that the offer of proof or the avowal of what was intended to be proved, made by counsel for plaintiff, furnishes evidence of the contents of these instruments. When oral testimony is excluded, a statement of counsel of what is expected to be proved is necessary to enable the court to determine the admissibility of the offered evidence, and on appeal it will be assumed that had the testimony been admitted it would have borne out the statement of counsel. But written instruments speak for themselves and the court determines their admissibility from an inspection of them, and an offer of proof by documents is unnecessary and should have no place in the record. At most, it can only be counsel's conclusion as to their effect, and the effect is to be adjudged by what appears in the documents themselves, and not by the avowal of counsel, as in the case of oral testimony. There is nothing in the record from which the nature of these doc-

uments can be determined, except their designation by name, and that furnishes no such evidence of their contents as to warrant the conclusion that there was error in their exclusion, in the absence of the documents themselves from the record.

VII.

The failure of the London-Glasgow Development Company to deposit proceeds of ore shipped by it is fatal to plaintiff in error's right to recover.

It is alleged in the answer, and testified to by Ferguson, that the London-Glasgow Development Company made four shipments of ore aggregating 147 tons, from which it received from the smelter $5630.66 over and above railroad freight and smelter charges, and that said company deposited $204.39 and no more to the credit of the Powers' with the Arizona National Bank.

On the face of it, this shows deliberate conversion and fraud.

Allowing the plaintiff in error per ton the $5.50 claimed for sacking and hauling to the railroad, and the $12 for which it contended, there would still remain $3058.16 unquestionably due the Powers'.

The company's ostensible excuse for holding this sum consists in the fact as testified to by Ferguson [folio 112] that the London-Glasgow Development Company made in addition to the four

shipments of ore mentioned in the complaint, twelve other shipments, a total of sixteen.

He testifies as to the tonnage and returns of nine of these additional shipments, thus disclosing by the evidence the tonnage and returns of thirteen shipments, and the fact that there were three additional shipments whose tonnage and returns do not appear.

The total twelve shipments testified to by Ferguson on cross-examination at folio 112 show a credit of 432 tons with aggregate returns of $6110.18.

As has been said, three of these twelve shipments were three of the four shipments set forth in the answer. The fourth shipment was in round figures 39 tons and the returns therefrom were $1883.37 [folio 109], showing as a total for the thirteen shipments 471 tons and $7,993.55 returns.

If you multiply 471 tons by $17.50 (the cost of hauling to the railroad and the $12 per ton) the product amounts to $8242 or some $250 more than the aggregate returns received from the smelter.

The three shipments which were not testified to are not material upon this argument. But, in order to elucidate the situation and theory of the plaintiff in error, it is fair to assume that the returns from such three shipments were such that their sum if added to the above mentioned aggre-

gate returns of $7993.55, would total $204.39, in excess of the product obtained by multiplying by $17.50 the entire tonnage including such three shipments.

In other words, the London-Glasgow Development Company made its first shipment of 40.18 tons and received therefrom $1128.61. [Folio 112.]

Instead of deducting 40 times $17.50 or $700 from this $1128.61, and transmitting the $428.61 balance to the bank for account of defendants in error, that company withheld such balance and made other shipments of low grade ore, the returns from which would run as low as $23 and $18, and then proceeded to charge against the surplus from the first shipment (which should have been already deposited in the bank) $12 for each ton of these subsequent shipments; thus appropriating to themselves all of the balance that was due to defendant in error. This was in flat violation of the express language of the contract and of the escrow instructions. [Folios 21 and 22.]

But the conversion rests upon another and an indisputable ground.

THESE THIRTEEN SHIPMENTS WERE ALL ORES FROM THE DUMPS. [Folio 112.]

The clause of the contract which has been the subject of so much dispute and litigation, provide

"that all ore which can be taken out of said working or stoped out below the said main level of the aforesaid World's Fair mine, and ALL ORES NOW ON THE DUMPS shall be milled and concentrated or leached on the grounds * * *, and it is understood and agreed that the sum of $12 per ton shall be allowed for such treatment. On all ores, *if any should be extracted from the workings as heretofore described*, which are better adapted to be shipped directly to a smelter and upon all concentrates, it is understood and agreed that a further allowance to the extent of the shipping and smelting charges shall be allowed." [Folio 17.]

It is obvious that by no possible construction of this language can the plaintiff in error lay claim to $12 per ton upon shipments of the ores "now on the dump."

Therefore, upon all ores which were shipped from the dumps, the defendants in error were plainly entitled to all of the profits except the charges of shipment and treatment.

To sum up the action of the London-Glasgow Development Company, it appears that such company deliberately shipped a lot of ore on the dumps not worth shipping, and whose smelter returns were nominal or unsubstantial, for the express purpose of establishing a plea to defraud the Powers' out of the returns of other shipments of ore.

It is conceded that Ferguson assigned the contract, exhibit A, to the London-Glasgow Development Company, and that the London-Glasgow

Development Company assigned the contract to the World's Fair Mining Company. [Folio 110.]

This contract was not a negotiable instrument and each assignee took it in the condition it was in at the time of the assignment. Each of the assignee corporations merely stepped into the shoes of the assignor and acquired all the rights and became subject to all the disabilities that would have existed had no assignment been made. If, therefore, the London-Glasgow Company was guilty of a breach of the contract which gave the Powers' the right to rescind or terminate it, the World's Fair Company took the contract in the exact condition, and stood in the same position as would the London-Glasgow Company have stood had the assignment not been made. Indeed, under such conditions and with a contract of this character it is essential in pleading that the complaint allege that the assignor as well as the plaintiff performed all the conditions of the contract, or show an excuse for non-performance, and this for the very reason that the assignee takes the contract *cum onere* and is subject to any disabilities created by a breach of the contract by the assignor.

Stern v. McKee, 70 N. Y. App. Div. 142, 75 N. Y. Supp. 157.

The complaint was therefore insufficient in that it failed to allege performance or an excuse for

non-performance of the contract by the London-Glasgow Development Company. The proof was uncontradicted and conclusive that prior to any act of the Powers' complained of as a breach, the London-Glasgow Company had itself broken the contract, and that its breach was of a character that authorized the Powers' to treat the contract as terminated.

Without respect therefore to any other question, this clearly proven breach of the contract is sufficient to bar any recovery by the assignee of the London-Glasgow Development Company, and necessitated a judgment for the defendants.

VIII.

The court did not err in directing a verdict for the defendants.

The proof conclusively showing breaches of the contract on the part of the London-Glasgow Development Company and of the World's Fair Mining Company, it is apparent that the defendants were entitled to treat the contract as ended and retake possession of the property, and such resumption of possession could not be the basis of a recovery of damages.

As was said by the Supreme Court of the territory:

> "Apart from the limitations of the complaint the evidence of the plaintiff also affirmatively showed that the company itself had

prior to the ouster failed on its part to live up to the requirement of the contract in that the deposit of the ore proceeds had not been made as required, and no excuse therefor had been pleaded or proved. The company having elected to continue under the contract after the alleged acts of interference and hindrance by reason of the injunction and attachment suit was bound to perform its covenants or plead and prove excuse for failure to do so, and in default thereof, having itself committed the first breach of the contract, it could not maintain this action against the defendant for their subsequent breach of ouster. The trial court was therefore right in holding that on the pleading and on the proof the company had not made out a cause of action, and in directing a verdict for the defendants."

Norrington v. Wright, 115 U. S. 188;

Loudenback v. Tennessee Co., 121 Fed. 298.

It is submitted that the judgment of the Supreme Court of the territory should be affirmed.

Dated Tucson, Arizona, January 22nd, 1912.

EUGENE S. IVES,

Attorney for Defendants in Error.